113 - 565

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 148.

ASSOCIATION

LYDIA M. FUSSELL, APPELLANT,

vs.

E. S. HUGHES ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED NOVEMBER 4, 1881.

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1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-rooms in the city of Toledo, in the division and district aforesaid, before the Honorable Stanley Matthews, Associate Justice of the Supreme Court of the United States, assigned to the sixth circuit, on the first day of October, being a day of the June term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and in the one hundred and sixth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

2 *Bill.*

UNITED STATES OF AMERICA, *Northern District of Ohio,* } *ss:*

In the Circuit Court, Western Division.

LYDIA M. FUSSELL, Plaintiff,
vs.
E. S. HUGHES & MARY C., his wife, W. P. HUGHES & MARIA, his wife, ESTHER DENNISON, and ELEAZER P. KENDRICK, Defendants. } Bill in Chancery.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, in chancery sitting:

I. Complaining, your oratrix, Lydia M. Fussell, shows unto your honors that your oratrix, Lydia M. Fussell, is a citizen of the State of Maryland, and that the defendants are all of them citizens of the State of Ohio.

II. That your oratrix, Lydia M. Fussell, is the only surviving grandchild and descendant of Archibald Gordon, late a revolutionary soldier and pensioner of the United States, resident in the county of Cecil and State of Maryland.

III. That her said grandfather, Archibald Gordon, on the 19th day of July, A. D. 1822, received from the register of the land office of the State of Virginia military warrant No. 6508 for 200
3 acres of land, allowed to him by the State of Virginia, in consideration of his services as a private in the Virginia Continental Line during the war.

IV. That on the 1st day of January, A. D. 1823, her said grandfather, Archibald Gordon, made an entry, No. 12017, in the Virginia military district in Ohio of 200 acres of land, in his own name, upon said military warrant, and caused his said entry to be recorded in the records of entries of lands in the office of the principal surveyor of said military district, in the words and figures following, to wit:

"January 1st, 1823. No. 12017.—Archibald Gordon enters 200 acres of land, on a military warrant, No. 6508, on the waters of

Rush creek, beginning at the northeast corner of Robert Green's entry, No. 10947; thence to his southeast corner; thence to the northeast corner of Aikin's entry, No. 10388; thence to the northwest corner of their entry, No. 10387; thence to the northeast corner of said entry, in the line of Parker's survey, No. 9958; thence N. 12 W. for quantity."

V. That her said grandfather, Archibald Gordon, on the 25th day of March, A. D. 1823, procured his said entry to be surveyed by Thomas J. McArthur, a deputy surveyor of said military district, and his survey thereof to be recorded on the record of surveys in the office of the principal surveyor of said military district, on the 5th day of November, A. D. 1824, in the words and figures following, to wit:

4 "Surveyed for Archibald Gordon 200 acres of land, on military warrant No. 6508, on the waters of Rush creek, beginning at a stake northwest corner to Alexander Parker's survey, No. 9958, in the line of Sawyer's survey, No. 10239; thence S. 12 E. 246 poles to two beeches in the line of Parker corner to Aikin's survey, No. 10387 & 10388; thence with a line of said survey S. 78 W. 134 poles to an ash and beech; thence N. 12 W. 246 poles to a hickory and elm in the line of Sawyer's said survey; thence N. 78 E. 134 poles to the beginning."

"LEVI D. THARP."
"HILKIAH ROSEBRAG, *C. C.*"
"WILSON L. THOMPSON, *M. K.*"
"THOMAS J. McARTHUR, *D. S.*"

"March 25th, 1823."
"November 5th, 1824."

VI. That said entry and survey were so made and recorded in conformity to law, were precise and certain, and appropriated the land on which they were made and vested in her said grandfather, Archibald Gordon, a good equitable estate to said land in fee-simple.

VII. That her said grandfather, Archibald Gordon, died intestate on the —— day of ———, A. D. 18—, seized of the equitable estate in fee-simple in said location of land, leaving issue, one son, his only child, viz., Archibald Gordon, late of the city of Baltimore, and State of Maryland.

VIII. That the son, said Archibald Gordon, of the city of
5 Baltimore, died intestate on the 13th day of April, A. D. 1830, seized of the equitable estate in fee-simple in said location of land, leaving issue, two daughters, then infants, his only children, viz., your oratrix, Lydia M., and Sarah Pri-cilla.

IX. That the sister of your oratrix, said Sarah Pri-cilla, intermarried with William H. Kelly, on the —— day of ———, A. D. 18—, and died intestate on the 12th day of May, A. D. 1853, seized of the equitable estate in one equal undivided moiety of said location of land, leaving her said husband and issue, one daughter, her only child, viz., Mary Elizabeth Kelly.

X. That the husband, said William H. Kelly, died on the ——— day of ———, A. D. 18—, leaving his said daughter surviving him.

XI. That the daughter, Mary Elizabeth Kelly, died on the ——— day of ———, A. D. 18—, an infant, intestate, and without issue, seized of the equitable estate in fee-simple, in one equal moiety undivided of said location of land, leaving your oratrix, her aunt, and sole heir-at-law.

XII. That your oratrix intermarried with Joseph B. Fussell, on the 31st day of October, 1854, and that her said husband died on the 6th day of December, 1864, since which time your oratrix, Lydia M. Fussell, has remained a widow.

XIII. Your oratrix, Lydia M. Fussell, avers that she is now
6 seized in fee-simple of the equitable estate in said location of land, and entitled to the immediate possession thereof, and that the premises are now situate in the county of Logan, in the northern district of Ohio, and within the jurisdiction of this honorable court.

XIV. But your oratrix, Lydia M. Fussell, further shows unto your honors that one Cadwallader Wallace, late a deputy surveyor of said military district, but now deceased, on the 30th day of October, A. D. 1834, made a survey of 150 acres of land, in his own name, in said district, and on the 5th day of November, A. D. 1834, procured his said survey to be recorded in the record of surveys in the office of the principal surveyor of said district, in the words and figures following, to wit:

"Surveyed for Cadwallader Wallace, ass'ee, 150 acres of land, on part of a military warrant, No. 5052, on the waters of Rush creek, beginning at an ash and two beeches, northeast corner to the representation of James Higgins' survey, No. 10837, thence S. 12 E. 240 poles to a stake in the line of the representation of David Aikins' survey, No. 10387 & 10388; thence with said line N. 78 E. 100 poles to a stake in the line of Archibald Gordon's survey, No. 12017; thence with said line N. 12 W. 240 poles to a hickory and elm, northwest corner to Gordon's survey; thence S. 78 W. 100 poles to the beginning."

"JOHN COX."
"PETER FUNK, *C. C.*"
"GEORGE JENKINS, *M. K.*"
"CADWALLADER WALLACE, *D. S.*"

"October 30th, 1834."
"November 5th, 1834."

7 XV. That said Cadwallader Wallace, on the 25th day of May 1840, made an entry of 50 acres of land in his own name in said military district, and procured his said entry to be recorded in the record of entries in the office of the principal surveyor of said military district, in the words and figures following, to wit:

"No. 14530. Cadwallader Wallace, ass'ee, enters 50 acres of land, on military warrant No. 6713, on Rush creek, beginning at the northwest corner of survey No. 12017; thence to the southwest corner

thereof, and from the beginning equal distance S. 78 W. for quantity."

XVI. And, on the same day, surveyed his said entry, No. 14530, per 50 acres of land, and had his survey thereof recorded in the record of surveys in the office of the principal surveyor of said military district on the 26th day of May, A. D. 1840, in the words and figures following, to wit:

"Surveyed for Cadwallader Wallace, ass'ee, 50 acres of land, on part of a military warrant, No. 6713, on the waters of Rush creek, beginning at a beech and large red oak, in the line of Archibald Gordon's survey, No. 12017; thence with said line S. 12 E. 174 poles to two ashes, southwest corner to said survey; thence, with the line of David Aikins' survey, No. 10387 & 10388, S. 78 W. 24 poles to three dogwoods, a white walnut, & hickory, corner, to said survey; thence with another line thereof N. 12 W. 60 poles to two beeches and an ash, corner to said survey; thence with an-
8 other line thereof S. 78 W. 5 poles to the southeast corner of said Wallace's survey, No. 13593, of 150 acres of land; thence with the line of said survey N. 12 W. 228 poles to the northeast corner thereof; thence N. 78 E. 29 poles to a stake in a pond, northwest corner, to Gordon's said survey; thence with the line thereof S. 12 E. 114 poles to the beginning."

"WILLIAM RICHARDS.
"JOHN LINGERALL, *C. C.*
"JOHN MEEHAM," "*M. K.*"
"CADWALLADER WALLACE, *D. S.*"

"May 25th, 1840."
"May 26th, 1840."

XVII. That said Wallace, on the 8th day of April, 1842, obtained a patent from the United States, in his own name, for his said survey of said entry, No. 14530, for 50 acres of land.

XVIII. But your oratrix, Lydia M. Fussell, avers that the monuments, the beech and large red oak, called for in the survey of the entry No. 14530 per 50 acres of land, in the name of the said Cadwallader Wallace, as the beginning corner of said survey are not in the line of said Archibald Gordon's survey No. 12017. But the said monuments and beginning corner of said survey of said Wallace, No. 14530, is a point 29 poles N. 78 E. from a point in the line of said Gordon's survey S. 12 E. 114 poles from the northwest corner of said Gordon's survey; and the northeast corner of the survey of said Wallace, No. 13503, per 150 acres of land, at a hickory and elm, in the line of Sawyer's survey, No. 10239, and that the survey of said entry, No. 14530, so made, covers 50 acres of
9 the land appropriated by the location entry and survey of said Gordon, and that the said entry and survey of said Wallace, No. 14530, and his patent issued thereon, were made and obtained in violation of the proviso of the second section of the act entitled "An act to extend the lines for locating Virginia military land warrants, and returning surveys thereon to the General Land

Office," approved March 1st, 1823, and are all of them void, and none of them ever appropriated any land or vested any title in said Wallace to the land so surveyed and patented to him as against your oratrix, or any of her ancestors or other persons under whom she derived title to said location and entry and survey No. 12017, made in the name of Archibald Gordon upon military warrant No. 6508.

XIX. Your oratrix, Lydia M. Fussell, shows unto your honors that at a time unknown to her some person, also to her unknown, without her knowledge or consent, or the knowlege or consent of her ancestors, or other person under whom she derives title to said survey of land No. 12017, wrongfully obtained from the office of the principal surveyor of said military district said military warrant No. 6508, and the original survey of said location and entry of land No. 12017, and has destroyed said warrant and original survey, or has suppressed them, and still doth, or the said military warrant
10 and original survey have been lost or misplaced in said office without the fault of your oratrix, or any of her ancestors or other person under whom she derives title to said location and survey of land No. 12017, so that they cannot now be found or produced.

XX. Your oratrix, Lydia M. Fussell, avers that one Eleazer P. Kendrick, being the principal surveyor of said military district, and in the possession of the records of the entries and surveys of land in said military district, at a time unknown to your oratrix, and without her knowledge or consent, or the knowledge or consent of any of her ancestors, or other person under whom she claims title to said premises, wrongfully wrote in the margins of the record of said entry No. 12017 the word "withdrawn," and on and across the plat and record of the survey thereof the words "State line;" that the writing of said words bear no date. But your oratrix avers that said words were so wrote upon said records subsequent to the making of the said entry and survey of said Wallace, No. 14530, per 50 acres of land, and that the said Eleazer P. Kendrick, still being such principal surveyor of said military district, now refuses to give to your oratrix a duplicate of her said survey No. 12017, with the necessary certificate as such principal surveyor, to enable her to obtain from the United States a patent for her said survey of land No. 12017 so made upon said military warrant No. 6508.

11 XXI. Your oratrix avers that said premises are adapted to grazing and the raising of grain and hay, and are very productive, &c., and that said E. S. Hughes and Mary C., his wife, W. P. Hughes and Maria, his wife, and Esther Dennison, have wrongfully kept your oratrix out of the possession of that part of said premises so surveyed upon the entry No. 14530 of said Wallace for several years, claiming title to said premises under the said Wallace, his said location and patent, and, to the exclusion of your oratrix, have received the rents and profits of said premises, amounting to a large sum, and refuse to account to your oratrix for said rents and profits, or any part thereof; all of which acts of said defendants are contrary to equity and good conscience, and tend to hinder and ob-

struct your oratrix in perfecting her title to said premises under the location of her said grandfather, Archibald Gordon, and the survey in his name, No. 12017, founded upon said military warrant No. 6508, and to do your oratrix other manifest wrongs and injuries to her rights in the premises. In consideration whereof, and inasmuch as your oratrix can only have adequate relief in a court of equity, where such matters are properly cognizable and relievable, your oratrix prays that the said E. S. Hughes & Mary C., his wife, W. P. Hughes and Maria, his wife, Esther Dennison and Eleazer P. Kendrick may be made defendants to this your orator's
12 original bill; that in the final hearing the location, entry, and survey No. 12017, in the name of her ancestor, Archibald Gordon, founded on said military warrant No. 6508, be established and affirmed, and that the validity thereof be forever perpetuated; that the location of the said Cadwallader Wallace, his entry, survey No. 14530, and patent be adjudged to have been made and issued in violation of the proviso of said act of Congress and void; that the said words "withdrawn" and "State line" so written upon said record, location, entry, and survey No. 12017 be adjudged to have been so written without authority, and that the evidence of said military warrant No. 6508 and original survey of said entry No. 12017 be forever perpetuated; that your oratrix may have an order for the delivery of the possession of said premises, and that an account may be taken of the rents and profits of said premises during the time they have been occupied by the said E. S. Hughes and Mary C., his wife, W. P. Hughes and Maria, his wife, and Esther Dennison, to the exclusion of your oratrix, and that such other relief may be granted to your oratrix as in equity she may be entitled; and your oratrix prays your honors to grant unto your oratrix the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants, commanding them by a certain day and under a certain penalty to be and appear before this honorable court, then and there to answer the premises, and to stand and abide such order and decree as may be made against them, and your oratrix will ever pray, &c.

13 JEREMIAH HALL,
Solicitor for Complainant.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

The plaintiff, Lydia M. Fussell, being duly sworn, says: That the facts stated in her said petition are true as she believes.

LYDIA M. FUSSELL.

Sworn to before me by said Lydia M. Fussell and subscribed by her in my presence, this first day of September, A. D. 1879.

[SEAL.] G. E. SANGSTON,
Notary Public.

Filed November 20th, 1879.

A. J. RICKS, *Clerk.*

14 *Subpœna*

THE UNITED STATES OF AMERICA, } *ss:*
Northern District of Ohio, Western Division, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon E. S. Hughes, Mary C. Hughes, W. P. Hughes, Maria Hughes, Esther Dennison, Eleazer P. Kendrick, if they be found in your district, to be and appear in the circuit court of the United States, in and for the division and district aforesaid, at Toledo, on the first Monday in February next, to answer a certain bill in chancery filed and exhibited in said court against them by Lydia M. Fussell.

Hereof they are not to fail, under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of November, A. D. 1879, and in the 104th year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk,*
By O. S. CASE, *Deputy Clerk.*

Memorandum.

The said defendants are required to enter their appearance
15 in this suit in the clerk's office of said court, in Toledo, on or before the first Monday in January, 1880, otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk,*
By O. F. CASE, *Deputy.*

NORTHERN DISTRICT OF OHIO, *ss:*

On the 25th of November, 1879, I made service of this writ by delivering a true and duly certified — thereof to each of the following within-named persons, to wit, to Mary C. Hughes, Maria Hughes, and Esther Dennison, and left a true and duly certified copy thereof at the usual place of abode of the within-named E. S. Hughes, in hands of his mother, Mary Hughes, a member of his family. I also same day left a true and duly certified copy thereof at the usual place of abode of the within-named W. P. Hughes, in hands of his wife Maria, all at Boke's Creek township, Logan county, Ohio.

The said E. S. Hughes and W. P. Hughes, being absent from home, could not be found.

The within-named Eleazer P. Kendrick not found; neither has he a residence in this district.

N. B. PRENTICE, *Marshall,*
By JOHN ODELL, *Deputy.*

Service	$10 00
Copies	3 00
Travel, 113 miles	6 78
	$19 78

16 *Answer in Chancery.*

In the Circuit Court, Northern District of Ohio.

WESTERN DIVISION, ss.:

LYDIA M. FUSSELL, Plaintiff;

vs.

E. S. HUGHES, W. P. HUGHES, ESTHER DENNISON, and ELEAZER P. KENDRICK, Defendants.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio, in chancery sitting:

Answering, the respondents, Esther Dennison and Mary Hughes, to the bill of complaint herein filed against them, shows to your honors the following matters of defense:

I. They say they have no knowledge or means of knowing the truth of the allegations in the bill contained, that the plaintiff is a grandchild and descendant of the said Archibald Gordon, Senior, or that she is a child and descendant of the said Archibald Gordon, Junior, or that she was married as stated, or that her alleged husband is deceased, or that she resides in the State of Maryland, or that her said alleged father or grandfather died intestate, or seized of an equitable estate in said lands, or that she hath an equitable estate therein, or that the said entry and survey No. 12017 were valid and subsisting at the date of said entry and survey No.
17 14530, or of the allegations contained in paragraph No. XX of the bill, and they deny each and all of them.

II. For a further defense they say that the complainant's said pretended cause of action, if it ever accrued to her at all, did not accrue within twenty-one years next preceding the commencement of this action, and hence that the same is barred by lapse of time.

III. For a further defense they say that the said Archibald Gordon, Senior, as they are informed and believe, did, in his lifetime, sell, assign, transfer, and deliver the said entry and survey No. 12017, by written assignment to the said Archibald Gordon, Junior, who afterwards, by his deed duly executed prior to his death, sold and conveyed the same and the land covered thereby to one Francis E. Hart.

IV. These respondents further say that the said Archibald Gordon, Senior, as they are informed and so charge, died prior to the death of the said Archibald Gordon, Junior, and that the said Archibald Gordon, Junior, afterwards, by his deed duly executed, sold and conveyed the said entry and survey No. 12017, and the lands covered thereby, to one Francis E. Hart, and did not own the same or any interest therein at his death.

V. These respondents further say, that the said Archibald Gordon, junior, in his lifetime, by his deed duly executed, acknowl-
18 edged, and delivered, sold and conveyed the said entry and survey No. 12017, and the lands covered thereby, to one Francis E. Hart, and the plaintiff is estopped by the said deed, from

denying the validity of the said conveyance, or asserting any title to or interest in the said lands against the same.

WEST, WALKER & WEST,
Solicitors for Respondents.

STATE OF OHIO, }
Logan County, } *ss:*

Esther Dennison, being first duly sworn, says she is one of the respondents, and that she believes the statements of the foregoing answers to be true.

ESTHER DENNISON.

Sworn to and subscribed by the said Esther Dennison before me and in my presence, this 11th day of December, A. D. 1879.

WILLIAM CALLAHAN,
Justice of the Peace in and for Boke's Creek Township, Logan County, Ohio.

Replication in Chancery.

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, } *ss:*

In the Circuit Court, Western Division.

LYDIA M. FUSSELL, Plaintiff, *vs.* E. S. HUGHES *et al.*, Defendants.

19 This repliant, said Lydia M. Fussell, for her replication to the answer of said respondents, Esther Dennison and Mary Hughes, says:

That as to the first defense stated in said answer, she will prove her said bill to be true, &c. That as to the 2d defense stated in said answer, she says: 1st. That as between herself and said respondents, the legal title to the premises in her bill described as entry and survey No. 12017 is in the United States.

2d. That neither she, nor those under whom she derives title to said premises, had any knowledge or information whatever of the fraudulent withdrawal of said entry and survey No. 12017, or of the fraudulent making of said survey No. 14530, upon the land appropriated by said entry and survey No. 12017, or the issuing of the patent to said Cadwallader Wallace, for that part of said entry and survey No. 12017, covered by said survey No. 14530, until within four years next before the filing of her said bill, and the commencement of her action herein.

That as to the 3d defense stated in said answer, she denies each and every allegation thereof, and avers that if her father, said Archibald Gordon, Junior, ever made a deed of said entry and survey No. 12017 to Francis E. Hart, or any other person, it was without consideration, and made at a time when her said father had no title to said entry and survey or seizure thereof; that it was without covenants of warranty, or other covenants of assurance of
20 title, and was made previous to the death of her gradfather said Archibald Gordon, Senior, who died, seized of said entry

and survey, that no possession was ever taken of said entry and survey under said pretended deed by said Francis E. Hart, or any other person.

That as to the 4th defense stated in said answer, she denies the execution of the deed alleged in said defense, and avers that said Archibald Gordon, Junior, her father, died seized of said entry and survey and the land covered thereby.

That as to the 5th defense stated in said answer, she denies each and every allegation therein stated, and avers that if her father, said Archibald Gordon, Junior, ever made a deed of said entry and survey, or the land covered thereby, to Francis E. Hart, or any other person, it was made before the death of her grandfather, said Archibald Gordon, Senior, who died seized of said entry and survey and the land covered thereby. That said deed, if made, was without valid consideration and without covenants of warranty or other assurances of title. That said Francis E. Hart, or any other person, never took or received possession of said entry and survey, or the land covered thereby, under said pretended deed, &c., and she denies that she is estopped to assert title to said entry and survey by reason of said pretended deed, &c.

JEREMIAH HALL,
Solicitor for Complainant.

21 THE STATE OF MARYLAND, *City of Baltimore*, } *To wit:*

The plaintiff, Lydia M. Fussell, being duly sworn, says: That the facts stated in her said replication are true as she believes.

LYDIA M. FUSSELL.

Sworn to before me by said Lydia M. Fussell and subscribed by her in my presence, this 17th day of March, A. D. 1880.

[SEAL.] G. E. SANGSTON,
Notary Public.

Alias Subpœna.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Western Division*, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon Eleazer P. Kendrick, if he is to be found in your district, to be and appear in the circuit court of the United States in and for the division and district aforesaid, at Toledo, on the first Monday in July next, to answer a certain bill in chancery filed and exhibited in said court against him by Lydia M. Fussell.

Hereof he is not to fail, under the penalty of the law thence
22 ensuing, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 10th day of May, A. D. 1880, and in the 104th year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk*,
By CLARENCE BROWN, *Deputy Clk.*

Memorandum.

The said defendant is required to enter his appearance in this suit in the clerk's office of said court, in Toledo, on or before the first Monday of June, 1880; otherwise the said bill may be taken *pro confesso*.

CLARENCE BROWN,
Dep. Clk.

Marshal's Return.

This writ returned to the court not served; the witness named, Eleazer P. Kendrick, not found; neither has he a residence in this District.

Copy, .50.

W. F. GOODSPEED,
U. S. Marshal.

Pracipe.

THE UNITED STATES OF AMERICA:

Circuit Court, Northern District of Ohio, Western Division.

LYDIA M. FUSSELL } *vs.* E. S. HUGHES *et al.* } No. 144.

23 Issue subpœna to the marshal of the southern district of Ohio for Eleazer P. Kendrick, of the parties defendant, who will be found at the city of Chillicothe, Ross county, Ohio.

Dated May 12th, 1880.

JEREMIAH HALL,
Attorney for Plaintiff.

CLERK OF CIRCUIT COURT.

Subpœna to Southern District.

THE UNITED STATES OF AMERICA } *ss:*
Northern District of Ohio, Western Division, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon Eleazer P. Kendrick, if he is to be found in your district, to be and appear in the circuit court of the United States in and for the division and district aforesaid, at Toledo, on the first Monday in July next, to answer a certain bill in chancery, filed and exhibited in said court against him by Lydia M. Fussell.

Hereof he is not to fail, under the penalty of the law thence ensuing, and have you then and there this writ.

24 Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 15th day of May, A. D. 1880, and in the 104th year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk*,
By CLARENCE BROWN, *Dep. Clk.*

Memorandum.

The defendant is required to enter his appearance in this suit in the clerk's office of said court, in Toledo, on or before the first Monday of June, 1880; otherwise the said bill may be taken *pro confesso*.

CLARENCE BROWN,
Dep. Clerk.

Marshal's Return.

Received this writ at Cincinnati, Ohio, May 18th, 1880, and served the same in Chillicothe, Ohio, May 31st, 1880, by delivery of true copy hereof to Eleazer P. Kendrick, personally, at 1.40 p. m.

J. C. ULBY, *U. S. Marshal, S. D. O.*,
By WM. M. TENUR, *Deputy.*

Service	2 00
Copy	50
102 miles	6 12
	$8 62

"And afterwards, to wit, on the 2nd day of October, A. D. 1880, it being a day of the June term of said court, this cause was continued until the next term of the court.

And afterwards, to wit, on the 23rd day of December, A.
25 D. 1880, it being a day of the December term of said court, this cause was continued until next term of this court."

Deposition.

Deposition of a witness taken in an action pending in the circuit court of the United States of America, western division of the northern district of Ohio, wherein Lydia M. Fussell is plaintiff, and E. S. Hughes *et al.* are defendants, and for said plaintiff at the time and place hereinafter mentioned, Jeremiah Hall, solicitor for the plaintiff, being present.

ELEAZER P. KENDRICK, of the county of Ross, of lawful age, being first duly sworn by me, as hereinafter certified, deposes as follows:

1st ques. State your name, age, occupation, and place of residence.

Ans. My name is Eleazer P. Kendrick; my age is ninety years on my last birth day. My occupation is principal surveyor of the Virginia military district in Ohio; place of residence, Chillicothe, Ross county, Ohio, where I keep the office of surveyor of said district.

2nd ques. State about what time you became such surveyor of said district, and who has been in possession of the records of locations of land in said district, and the papers, &c., pertaining
26 to said office, since your qualification as such surveyor.

Ans. I became principal surveyor of said district about the

year A. D. 1845, and I have been entitled to the possession of all the papers and records pertaining to said office ever since, and I have been in the actual possession of all the records of said office since said date.

3rd ques. If there is a location of record in said office, of land in said district, in the name of Archibald Gordon, state what is the number of the location; in what county situate; upon what military warrant founded, and when made.

Ans. There is a location of land in said district, of record in said office, in the name of Archibald Gordon, for two hundred acres, founded upon military warrant No. 6508, situate in Logan county, which was made the entry January 1st, 1823, surveyed on the 29th of March, 1823, and recorded on the 6th day of November, 1824. But the entry and survey are marked "withdrawn" on the record. The number of the location is 12017.

4th ques. How did it occur that said location of Gordon was withdrawn of record?

Ans. Because Gordon's location was made upon a State line warrant, or supposed to be.

5th ques. What knowledge had Gordon, or any one claiming his location, of the making of said withdrawal of record?

Ans. I can't say they had any knowledge of it.

27 6th ques. State whether, or not, you ever saw the original military warrant, No. 6508, on which Gordon's location is founded, or the original survey of said location, No. 12017?

Ans. I never did.

7th ques. Were you, at any time, retained by Gordon, or any one claiming to own his said location?

Ans. I was not.

8th ques. Did any of your predecessors in office retain the original warrants and surveys in location of lands in said district of record in said office, made for other locators than themselves; if so, who did?

Ans. My predecessor, Mr. Fllenn Latham, retained those surveys which had been recorded when he left the office, on which he had a lien for office fees.

9th ques. Did Latham, or any other person, direct you to make a withdrawal of Gordon's said location?

Ans. I don't know that the withdrawal is in my handwriting, and I have not the record present to determine whether it is in my handwriting, or not; nor do I remember of Latham, or any other person, requesting me to make such withdrawal.

10th ques. What note, if any, was made upon the face of the record of the survey, when the papers in a case were delivered to the locator, his agent, or attorney, or other person?

28 Ans. A note was made to whom the papers were delivered, and the date thereof.

11th ques. What note was made, if any, on the face of the record of locations retained by Mr. Latham, or any other of your predecessors?

Ans. No note whatever.

12th ques. What note, if any, was made upon Gordon's location?
Ans. No note, except "State line."
13th ques. What did Latham do with the papers in the cases or locations retained by him?
Ans. Latham kept an office in Chillicothe after he resigned his office of surveyor, and kept such papers as he retained in his office. Daniel Gregg became his clerk in process of time; and after he, Mr. Latham, removed from Chillicothe, more than twenty years ago, the office of Mr. Latham's business were left in Mr. Gregg's possession, and still are in his custody as executor of Mr. Latham, who has been dead for several years.
And further deponent saith not.

E. P. KENDRICK.

THE STATE OF OHIO, }
Ross County, } *ss:*

I, J. Clifford Douglas, a notary public of the State of Ohio, in and for the county of Ross, do hereby certify that the above-
29 named Eleazer P. Kendrick was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition, by him subscribed to, was reduced to writing by me and written, and by said witness subscribed in my presence, and was taken at the time and place specified in the enclosed notice.

In testimony whereof I have hereunto set my hand and official seal, this 10th day of February, A. D. 1881.

[SEAL.] J. CLIFFORD DOUGLAS,
Notary Public.

Fees—Witness;.....$1 00
Notary, writing deposition and certificate.... 2 50
$3 50

Received payment,
J. CLIFFORD DOUGLAS.

EXHIBIT "A."

THE STATE OF MARYLAND, }
Baltimore City, } *sct:*

I hereby certify, to all whom it doth or may concern, that on the 31st day of October, in the year of our Lord one thousand eight hundred and fifty-five, a license, issued from the office of the clerk of the court of common pleas for Baltimore city, directed to
30 the Reverend McManus, or any other person qualified by law to celebrate the rites of marriage, between a certain Joseph B. Fussell and Lydia M. Gordon, of Baltimore city, according to law, there appearing to him no lawful cause, or just impediment, by reason of any consanguinity or affinity to hinder the same, as by the records of said court appear, which records are now in my keeping.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, this 5th day of March, 1881.

[SEAL.] J. FREEMAN RASIN,
Clerk of Court of Common Pleas.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

EXHIBIT "B."

THE STATE OF MARYLAND, *Baltimore City,* } *set:*

I hereby certify to all whom it doth or may concern that on the 2nd day of December, in the year of our Lord one thousand eight hundred and forty-eight, a license issued from the office of the clerk of Baltimore county court, directed to the Reverend Mr. Donoly, or any other person qualified by law, to celebrate the rites of marriage between a certain William H. Kelly and Sarah P. Gordon, of Baltimore county, according to law, there appearing to him no lawful cause or just impediment, by reason of any consanguinity or
31 affinity, to hinder the same, as by the records of said court appear, which records are now in my keeping.

In testimony whereof, I hereto subscribe my name and affix the seal of the superior court of Baltimore city, this 5th day of March, 1881.

[SEAL.] F. A. PREVOST,
Clerk of the Superior Court of Baltimore City.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

EXHIBIT "C."

THE STATE OF MARYLAND, *Baltimore City,* } *set:*

I hereby certify to all whom it doth or may concern that on the 6th day of January, in the year of our Lord one thousand eight hundred and twenty-seven, a license issued from the office of the clerk of Baltimore county court, directed to the Reverend Mr. ———, or any other person qualified by law, to celebrate the rites of marriage between a certain Archibald Gordon and Sarah Ann Hart, of Baltimore county, according to law, there appearing to him no lawful cause or just impediment, by reason of any consanguinity or affinity, to hinder the same, as by the records of said court appear, which records are now in my keeping.

In testimony whereof, I hereto subscribe my name and affix the seal of the superior court of Baltimore city, this 5th day of
32 March, 1881.

F. A. PREVOST,
Clerk of the Superior Court of Baltimore City.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

EXHIBIT "D."

(Duplicate.)

Land Office Military Warrant No. 6508.

To the principal surveyor of the land set apart for the officers and soldiers of the Commonwealth of Virginia:

This shall be your warrant to survey and lay off, in one or more surveys, for Archibald Gordon, his heirs or assigns, the quantity of two hundred acres of land, due unto the said Archibald Gordon, in consideration of his services as a private in the Continental line for the war, agreeably to a certificate from the Governor and council which is received into the Land Office.

Given under my hand and the seal of the said office, this 19th day of July, in the year one thousand eight hundred and twenty-two.

[SEAL.] W. G. PENDLETON,
Reg'r L. Office.

(200 acres.)

In pursuance of an advice of council, I certify that this
33 warrant has issued in conformity with laws of Virginia in force prior to the cession, by that State, of her western lands to Congress; and I furthermore certify that no other warrant has issued from the land office of Virginia, on account of the services of the within-mentioned Archibald Gordon; and that no grant has issued on this warrant.

Given under my hand and the seal of the said office, this 19th day of July, 1822.

WM. G. PENDLETON,
Reg'r L. Office.

VA. LAND OFFICE, RICHMOND, *September 15th*, 1879.

I certify that the within warrant is issued as a duplicate for No. 6508, which issued from this office, for the services of Archibald Gordon, and which, it appears by certificate of the probate court of Pickaway county, Ohio, has been lost.

RANDOLPH HARRISON,
Reg'r L. Office.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

Depositions of witnesses taken in an action pending in the United States circuit court for the northern district of the State of Ohio, western division, wherein Lydia M. Fussell is plaintiff and E. S. Hughes *et al.* are defendants, and for said plaintiff at the time and place hereinafter certified.

Present: Jeremiah Hall, solicitor for plaintiff, and Arthur Geo. Brown, attorney for defendants.

34 ANN E. PORTER, of the city of Baltimore, State of Maryland, of lawful age, being by me duly cautioned and sworn, as hereinafter certified, deposes and says, as follows:

Ques. 1. State your name, age, and place of residence.

Ans. My name is Ann E. Porter; sixty-two years of age; residence, Baltimore city.

Ques. 2. Are you acquainted with Mrs. Lydia M. Fussell, of the city of Baltimore, plaintiff in above action? If so, state who were her father and mother.

Ans. I am acquainted with her. She was the daughter of Sarah Ann Hart (who was the daughter of Joseph Hart); her father's name was Gordon, but I don't recollect his Christian name. Her mother was an own cousin of mine.

Ques. 3. State whether or not her parents were respectable, and how they were recognized.

Ans. They were very respectable, and were recognized as husband and wife.

Ques. 4. Did Mrs. Fussell have any brothers or sisters; and, if so, who were they, and are they dead or alive?

Ans. She only had one sister, and had no brother. They were infants when their mother died.

Ques. 5. About what time did her mother and father die?

Ans. Her mother died about fifty years ago, and her father died about two months after her mother died. Her mother died of consumption, and her father of small-pox. Her sister also died some years ago.

Cross-examination by defendants' counsel:

Ques. 6. You state that the maiden name of Lydia M. Fussell's mother was Sarah Ann Hart, and that she died about fifty
35 years ago. Please state where Mrs. Fussell's mother died, and all that you recollect personally about the circumstances of her death.

Ans. I recollect nothing particularly about the circumstances of her death, except that she died of consumption, and at her father's house on Green Mount ave.

Ques. 7. In what year did she die?

Ans. I don't remember the year.

Ques. 8. When did your acquaintance with Mrs. Lydia M. Fussell begin, and where were you living, and where was she living at the time?

Ans. From childhood. I was living in Baltimore, but do not now recollect the exact locality. Mrs. Fussell was then living on Green Mount ave; afterwards removed into the country to live with her aunt.

Ques. 9. How do you know that Sarah Ann Hart's father's name was Joseph Hart?

Ans. I know it, because he was my uncle; married my father's sister.

Ques. No. 10. When did Joseph Hart die, and where?

Ans. I cannot state the exact year he died, but I know that he died at his country place on Miller's Island. My recollection goes back to the time of his death; cannot state particulars; but his death occurred some years ago.

Ques. No. 11. How old were the father and mother of Mrs. Fussell, respectively, at the time of their death; and were they young or old people?

Ans. I do not recollect the dates; but they were young people.

36 Ques. No. 12. When were they married, and where?

Ans. Cannot recollect, being too young; but I knew they were married.

Ques. No. 13. Were you present at their wedding?

Ans. I was not.

Ques. No. 14. State, as nearly as you can, your exact age at the time Mrs. Fussell's mother died.

Ans. I was only a little girl, about ten years old. She has been dead for more than fifty years, and my age is now sixty.

Re-examination by solicitor for plaintiff:

Ques. No. 1. The plaintiff, Mrs. Fussell, having come into the office since your examination, state whether or not you recognize her as the lady to whose identity you have been testifying.

Ans. I do.

ANN E. PORTER.

Also, RACHEL A. PORTER, of the city of Baltimore, State of Maryland, of lawful age, first being by me duly cautioned, and sworn, as hereinafter certified, deposes and says as follows:

Ques. No. 1. State your name, age, and place of residence.

Ans. My name is Rachel A. Porter; my age is about fifty-four years; and I reside in Baltimore.

Ques. No. 2. What knowledge have you of Mrs. Lydia M. Fussell, the plaintiff in this action?

Ans. I have known her ever since childhood, and we were of about the same age; her mother was a cousin of mine, and I know her to be a grand-daughter of Joseph Hart. Mrs. Fussell is a

37 widow, and very respectable; I never knew her husband.

Cross-examination by defendants' counsel:

Ques. No. 3. What personal knowledge, or acquaintance, if any, had you with the parents of Mrs. Fussell, or either of them?

Ans. I have a very faint recollection of her mother; knew there was such a person, but I cannot describe her.

Ques. No. 4. You say that Mrs. Fussell was married; were you present at her wedding? If so, state when and where she was married, and by whom.

Ans. I was not present, and do not know anything at all about her marriage.

Re-examination by solicitor for plaintiff:

Ques. No. 1. The plaintiff, Mrs. Fussell, having come into the office since your examination, state whether or not you recognize her as the lady to whose identity you have been testifying?

Ans. I do.

RACHEL ANN PORTER.

Defendants' counsel objects to Mrs. Fussell's testifying in her own behalf, and to each and all the answers she may give to such questions as may be asked her.

Also, Mrs. LYDIA M. FUSSELL, the plaintiff in this action, of the city of Baltimore, State of Maryland, of lawful age, being by me first duly cautioned and sworn, as hereinafter certified, deposes and says, as follows:

38 Ques. No. 1. State your name, age, and place of residence.

A. Lydia M. Fussell is my name; my age is fifty-three on last birthday; I reside in Baltimore city, State of Maryland.

Ques. No. 2. Please state who were your father and mother, and who they were, and who were their ancestors.

Ans. My father's name was Archibald Gordon; my mother's maiden name was Sarah Ann Hart, and her father was Joseph Hart, late of Baltimore, who died at Miller's Island, Chesapeake Bay, about twenty-nine years ago; my father was a son of Archibald Gordon, of Elkton, Cecil county, Md.

Ques. No. 3. State whether or not you know from reputation that your grandfather, Archibald Gordon, was a Revolutionary soldier and pensioner of the United States Government.

(Question objected to by defendants' counsel.)

Ans. I have always heard that he was a Revolutionary soldier, and a pensioner of the United States Government therefore.

(Answer objected to by defendants' counsel.)

Ques. No. 4. State whether or not your father and mother are dead, and, if dead, about what time they respectively died.

Ans. They are both dead. My mother died first, about fifty years ago, on 13th day of February; precise year forgotten; my father died the following April—on the 13th April—just two months
39 after my mother died. My mother died of consumption, and my father died of small-pox. They both died in Baltimore city, State of Maryland, at their residence on Green Mount avenue.

Ques. No. 5. At the death of your father and mother, did they, or either of them, make a will or wills?

Ans. None that I ever knew of or heard of.

Ques. No. 6. At their death, how many children, if any, did they have?

Ans. There were only two children—myself and my sister, Sarah Priscilla Gordon.

Ques. No. 7. Who did your sister Sarah marry? And if she bore any children, state how many; and is she or her husband living or dead?

Ans. She married William H. Kelly; she had three children, all of whom are dead; her husband and herself are both dead.

Ques. No. 8. State whether your sister Sarah—Mrs. Kelly—left any will.

Ans. She left no will.

Ques. No. 9. What were the ages of the children at their death?

Ans. Two of them died before their mother died; one was about one year old, and the other an infant of a few hours old. One of the three children survived its mother, and was nine years six months and three days old when she (the child) died.

Ques. No. 10. About what was the age of your sister Sarah at her death, and state about when her death occurred?

40 Ans. She was twenty years and twelve days old when she died, and she died on May 12th, 1853.

Ques. No. 11. About what was your sister's age at the date of her father's and mother's death?

Ans. She was about twenty-two months old when her mother died.

Ques. No. 12. Which was the elder, your sister or yourself?

Ans. Myself. I was near about three and a half to four years older than my sister.

Ques. No. 13. At what time were you married and to whom?

Ans. I think about 1855, on 31st October, I was married to Joseph B. Fussell, and I herewith file a certificate of the clerk of court of common pleas of the State of Maryland, that a marriage license was issued on 31st day of October (1855), eighteen hundred and fifty-five, to celebrate the rites of marriage between Joseph B. Fussell and Lydia M. Gordon, such certificate to be marked Exhibit "A" and filed herewith; and I also file certificate of the clerk of the superior court of Baltimore city, State of Maryland, that on the 2nd day of December, A. D. one thousand eight hundred and forty-eight (1848), a license was issued from the office of the clerk of Baltimore county court, directed to Rev. Mr. Donoly, to celebrate marriage rites between William H. Kelly and Sarah P. Gordon, said certificate to be marked Exhibit "B" and filed herewith; and I also file certificate of the clerk of the superior court of Baltimore city, State of

41 Maryland, that on (6th) sixth day of January, one thousand eight hundred and twenty-seven (1827), a license was issued from the office of the clerk of Baltimore county court, directed to Rev. ——, to celebrate rites of marriage between Archibald Gordon and Sarah Ann Hart, said certificate to be marked Exhibit "C" and filed herewith.

Defendants' counsel notes an objection to this answer and to each and all the certificates filed therewith, on the ground that said certificates are irrelevant and not admissible in evidence.

Ques. No. 14. State, if you can, about what time your sister Sarah's husband, Wm. H. Kelly, died?

Ans. He died two or three years after my sister Sarah's death and previous to his surviving child's death.

Ques. No. 15. Were any of your sister Sarah's children married, or did they leave issue?

Ans. They died infants; were never married; left no issue.

Ques. No. 16. State about what time your husband died.

Ans. He died on 6th December, 1865. He died at Friendfield, Marion district, State of South Carolina.

Ques. No. 17. You may state now whether or not, from the information you have of your father's ancestry, whether your grandfather had any other children than your said father.

Ans. I never heard of any.

42 Last foregoing question and answer objected to by defendants' counsel, on ground that witness has no personal knowledge or certain information concerning the matter referred to.

Ques. No. 18. Then we are to understand that you claim to be the sole surviving heir-at-law of your father, and grandfather, Archibald Gordon, to any estate that may have been left by them or either of them?

Question objected to by defendants' counsel, as a leading question.

Ans. I do claim to be the sole surviving heir.

Ques. No. 19. State whether or not you ever employed any attorney in Ohio to withdraw or in any manner interfere with the location of any lands located in the Virginia military district in Ohio, for your grandfather, founded upon the military warrant No. 6508, issued to him for his military services in the Virginia Continental army, during the war of the Revolution, a duplicate of which is herewith filed and attached, marked "Exhibit D?"

Ans. I never did.

Ques. No. 20. What knowledge had you of Eleazer P. Kendrick, the principal surveyor of the Virginia military district in Ohio, entering a withdrawal of a location afterwards in the Virginia military district No. 12017, for two hundred acres of land, founded on the said military warrant of record in his office?

43 Question objected to by defendants' counsel, as a leading question.

Ans. I have no knowledge of it whatever.

Ques. No. 21. What knowledge, if any, did you have of one Cadwallader Wallace making a survey of fifty acres of land upon a part of the land previously located and surveyed for your said grandfather upon said military warrant?

Ans. No knowledge whatever.

Ques. No. 22. State whether or not you authorized Wallace, or any other person, to withdraw the location of lands made in said district for your grandfather, founded upon his said warrant?

Ans. I never did.

Ques No. 23. State from whom you derived your first information respecting the withdrawal entered upon the record of the location of lands made upon the said warrant for your grandfather, and of the said survey in the name of the said Wallace, made upon the said location of your grandfather?

Ans. I heard it from Mr. Hall, my counsel, about six years ago.

Ques. No. 24. Where have you lived during your whole life?

Ans. During the early part of my life, from the time my parents died until I was about twenty-six years old, I resided with my grand-
aunt, in Baltimore county, near Govanstown; my Grandfather
44 Hart's sister, Mrs. Baker, her husband's name was John Baker; after that, for two years, I was visiting in Connecticut and also in Baltimore; at the end of that time I married, and then removed to the South, living in Virginia and South Carolina, until my husband's death in 1865; after that I returned to Balto., where I have since resided; I am a widow with four surviving children.

Cross-examination by defendants' counsel:

Ques. No. 1. What property or estate, if any, did your father or mother leave; and where was it administered?

Ans. I don't think that either of them left any estate that was administered on.

Ques. No. 2. You have spoken of their residence on Green Mount Ave. Who owned the house they then lived in?

Ans. I do not know. They lived with my Grandfather Hart.

Ques. No. 3. After you left the house of your aunt, Mrs. Baker, when you were twenty-six years old, where did you first go, and with whom did you stay, and how long did you remain?

Ans. I first went to Connecticut and stayed nearly a year, and stayed with Thomas Brooks and Emily, his wife. She was my mother's sister. Mr. Thomas Brooks and his wife are both dead. They lived at Burlington, Hartford Co., Connecticut.

Ques. No. 4. Where did you go from the house of Mrs.
45 Brooks, of Connecticut?

Ans. I went to Mrs. John B. Fidy's, in Baltimore, from whose house I was married. I stayed at her house from the time I left Connecticut until I was married. I was married by Rev. Bernard J. McManus, pastor of St. John's Catholic Church, corner of Eager & Valley Sts. Mrs. Fidy's residence was No. 25 E. Monument st., between Constitution and Buren Sts.

Ques. No. 5. In what towns or places did you reside in Virginia and South Carolina after you were married?

Ans. I lived in Louisa Court-House, Lynchburg, Pittsylvania Court-House, in the State of Virginia; and at Friendfield, South Carolina, where my husband died.

Ques. No. 6. When did you go to Lynchburg, Va., and when did you leave; and where did you reside while there?

Ans. About 1856 I went to Lynchburg from Louisa Court-House; resided in Lynchburg about seven or eight years, in our rented house; cannot recollect the name of the street, or if it had any name. From Lynchburg I went to Pittsylvania Court-House, and from there to Friendfield, South Carolina.

Ques. No. 7. What, if any, was your husband's occupation when you resided in Lynchburg?

Ans. He was a blacksmith; worked at the shops of the Virginia & Tennessee railroad.

46 LYDIA M. FUSSEL.

STATE OF MARYLAND, *City of Baltimore,* } *to wit:*

I, Felix R. Sullivan, a notary public for the State of Maryland in and for the city of Baltimore, commissioned and duly qualified, do hereby certify that Ann E. Porter, Rachel A. Porter, and Lydia M. Fussell were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the above entitled cause; and that the foregoing deposition by them respectively subscribed were reduced to writing by me and subscribed by the said witnesses in my presence, and were taken at time and place in the inclosed notice specified.

In testimony whereof, I have hereunto set my hand and notarial seal, this 5th day of March, A. D. 1881.

[SEAL.] FELIX R. SULLIVAN,
Notary Public.

FELIX R. SULLIVAN,
Notary Public.

Cost of taking depositions and postage paid by Lydia M. Fussell, plaintiff, $15.00.

FELIX R. SULLIVAN,
Notary Public.

47 Deposition of a witness taken in an action pending in the circuit court of the United States of America, western division of the northern district of the State of Ohio, wherein Lydia M. Fussell is plaintiff and E. S. Hughes *et al.* are defendants, and for said plaintiff, at the time and place hereinafter mentioned, Jeremiah Hall, solicitor for the plaintiff, being present, and W. H. West, present on behalf of defendant; ALEXANDER GORDON, of the city of Pittsburg and State of Pennsylvania, of lawful age, being first duly sworn by me, as hereinafter certified, deposes as follows:

1st Ques. State your name, age, occupation, and place of residence.

Ans. My name is Alexander Gordon; my age is seventy-three years; my occupation is a starter of the cars of ——— R'way Co.; my residence, in the 17th ward, Pittsburg, Pa.

2nd Ques. State where you were born and raised, and who was your father.

Ans. I was born and raised in New Castle county, ——— Hundred, State of Delaware; my father was Archibald Gordon, the son of John Gordon.

3rd Ques. State what relation your father was to Archibald Gordon, a Revolutionary soldier, if any such man resided in the neighborhood of where you were born and raised.

Ans. My father was a nephew of old Archibald Gordon of the Revolutionary war.

4th Ques. How do you know old Archibald Gordon, the uncle
48 of your father, was a man of the Revolutionary war?

Ans. I have heard him say he was in a good many battles, and that he was in the army for seven years.

5th Ques. How near did he live to Elkton, Cecil county, State of Maryland?

Ans. About from two and a half to three miles.

6th Ques. About what time did he die?

Ans. I think, as near as I can come at it, about the year 1828 or the year 1829. I am pretty old now, and it is a good while ago.

7th Ques. What do you know about said old Archibald Gordon, the uncle of your father, having been a Revolutionary pensioner of the United States?

Ans. I have heard him say that he drew a pension of eight dollars a month.

8th Ques. State whether ever you were at his house, and about how frequently?

Ans. I have been at his house about a half a dozen times a year.

9th Ques. Had you a knowledge of his family; if so, state how many children he had, if any?

Ans. I knew his last wife; his first wife I never knew. He had one child by his first wife, named Archibald Gordon. He had no children by his last wife. He had no other children to my knowledge.

10th Ques. Who was your old Uncle Archibald Gordon's last wife?

Ans. Mrs. Hayes.

11th Ques. Had Mrs. Hayes any children previous to her
49 marriage to your Uncle Archibald Gordon, the soldier and pensioner?

Ans. She had one son to my knowledge.

12th Ques. Where did Archibald Gordon, the son of the soldier and pensioner, go to?

Ans. He went to Baltimore, in the State of Maryland.

13th Ques. At the time he went away state whether he was or not a married man.

Ans. He was not married when he left Cecil county, Maryland.

14th Ques. State whether or not he afterwards married.

Ans. He married a girl by the name of Hart.

15th Ques. Where did he marry her?

Ans. In Baltimore, to the best of my knowledge, and lived on Pool's Island.

16th Ques. Had he any family?

Ans. All I know about it is what my father told me. He told me that he was at his house and that he had two daughters.

17th Ques. State whether or not Archibald Gordon, the son of your great uncle, who married Hart's daughter, of Baltimore, is living or dead; and, if dead, about how long ago since he died?

Ans. He is dead, but I cannot say how long ago since.

18th Ques. Is it few or many years?

Ans. It is a few years ago any way.

19th Ques. Was it before or after your father died; and, if so, about how long has your father been dead?

Ans. He died before my father died. My father died in 1845.

20th Ques. You may state any information you may have respecting the plaintiff, Mrs. Lydia M. Fussell, and of her connection with Archibald Gordon, who went down to Baltimore from Cecil county, Md., and married Hart's daughter.

Ans. I have no knowledge of it at all.

21st Ques. Never heard of Mrs. Fussell?

Ans. I have heard of her, and that is all.

22nd Ques. In what connection have you heard of her?

Ans. I have heard of her as the daughter of Archibald Gordon.

23rd Ques. As one of the two daughters before mentioned?

Ans. Yes.

24th Ques. State whether or not your great uncle, said Archibald Sterling, the soldier, at his death made a will.

Ans. I never heard of his making a will.

25th Ques. State what trade he was, if any.

Ans. I don't know that he had any trade at all; if he had he was a shoemaker.

The defendants except to each and every question in the foregoing deposition, 1st, because it is leading; 2nd, because it is suggestive of the answer; 3rd, because it assumes facts and conclusions; and they except to each of the foregoing answers by the witness, because it is incompetent, hearsay, and irrelevant.

Thereupon the witness was cross-examined by W. H. WEST for the defence.

Cross-examination:

1st Ques. In what year were you born?

Ans. 3rd day of March, 1808.

2nd Ques. How far were you born from Elkton, Md.?

Ans. About seven miles.

3rd Ques. How long did you reside where born?

Ans. I lived there about 22 years.

4th Ques. To what place did you then remove?

Ans. I moved from there to Cecil county, Md.

5th Ques. How long did you remain in Cecil county?

Ans. I remained there about five years.

6th Ques. To what place did you then remove?

Ans. Montgomery county, Pa., and from thence here.

7th Ques. How long have you resided here in Pittsburg?

Ans. Twenty-one years the third day of July last.

8th Ques. Where did your father reside at his death?

Ans. New Castle, Delaware.

9th Ques. Had he ever resided at other places after you were born?

Ans. He resided in New Castle county from the time I was born until his death.

10th Ques. When and where was it your father told you that he had visited the family of Archibald Gordon, Jr., and that he had two daughters?

Ans. It was about in 1831 or 1832, in my father's house, in New Castle county, Delaware.

11th Ques. Did you ever see said Archibald Gordon, Jr., after the time you say he went to Baltimore?

Ans. I never did.

12th Ques. Did you ever see the person whom he was said to have married?

Ans. No, I never saw her.

13th Ques. How long before said Archibald Gordon, Jr., was said to have gone to Baltimore did you last see him?

Ans. About a year before.

14th Ques. Can't you state the precise year and time when
52 you removed to Cecil county, Md.?

Ans. In the year 1838.

15th Ques. Between the time when you were twenty-two years old and the removal to Cecil county, state if you were absent from Delaware and Md.; and, if so, where?

Ans. I was in Kentucky about one year, and Lancaster, Pa., about two years, and in Cecil county, Md., about two years, working around in different places wherever I could get employment.

16th Ques. State if you had been in conversation with Mr. Jeremiah Hall, the attorney here, this morning, or yesterday, on the subject of this deposition, and your recollection about it.

Ans. No further than to direct Mr. Hall where to find a notary public.

17th Ques. Have you received any letter or letters within the last ten years from the plaintiff, Mrs. Fussell, or from her attorney or other person, on the subject of her family connection, and of your knowledge or information respecting it?

Ans. No; I have not received any letter from any person, except Mr. Hall, for information where he would find me and a notary public.

18th Ques. When and from whom did you ever receive information respecting the parentage of the plaintiff, Mrs. Fussell?

Ans. I received the information from my father.

19th Ques. When and from whom did you first learn the name of Lydia M. Fussell?

Ans. I heard her name first from my son, who was in Bal-
53 timore, Md., about eleven years ago.

So much of the answer of the witness as speaks of his son being at Baltimore, Md., is repudiated by the defendant, as not being responsive to the question.

20th Ques. When did you first hear the name of Lydia M. Fussell?

Ans. If I mistake not about it, it was in January, 1870.

21st Ques. In what year did you last see Archibald Gordon, Jr.?

Ans. It must have been in about the year 1820, as near as I can recollect.

22d Ques. Have you ever seen him, or any person claiming to be a member of his family, since then?

Ans. I have never seen any one so claiming, in my hearing.

23d Ques. Did you not give your deposition some years ago in a cause then pending in the court of common pleas of Logan county, Ohio, in which Margaret A. Hart and others were plaintiffs and Daniel Gregg and others were defendants, in which you stated, in substance, that you did not remember, and could not state the year when Archibald Gordon, Sr., died?

Ans. I did give my deposition in said case; I don't remember that I then stated the year, nor do I remember the year now; but, as near as I can recollect now, it was in the year 1828 or the year 1829.

24th Ques. Might it not have been some sooner or some later?

Ans. Yes; it might have been sooner or later.

25th Ques. As to whether the plaintiff was or was not a
54 daughter of Archibald Gordon, Jr., have you personal knowledge or any information except hearsay?

Ans. All the information I have about it I derived it from my father after he had been to Archibald Gordon's house and told me that he had two daughters, and as near as I can remember this was in the year of 1831 or 1832.

Re-examined by plaintiff's solicitor:

1st Ques. What do you know about the death or burial of Archibald Gordon, the soldier?

Ans. I don't recollect anything about his death or burial. I don't remember that I was in the neighborhood at the time.

2nd Ques. What was the age of his son as compared with your own?

Ans. To the best of my recollection he was about five or six years older than me.

ALEXR GORDON.

PITTSBURG, PENNSYLVANIA, *March 8th*, 1881.

It is hereby agreed that the foregoing deposition shall be treated by the court as this district deposition, taken respectively under each of the annexed notices, one in the action of Lydia M. Fussell *vs.* E. S. Hughes *et al.*, and the other in the action of Lydia M. Fussell *vs.* Daniel Gregg.

JEREMIAH HALL,
Solicitor for Mrs. Lydia M. Fussell.
W. H. WEST,
For Defendant.

THE STATE OF PENNSYLVANIA, }
Allegheny County, } *ss:*

55 I, William Smith, a notary public in and for said county and State, do hereby certify that the above Alexander Gordon was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth.

That the foregoing deposition by him subscribed was reduced to

writing by me in the presence of said witness, and was by said witness subscribed in my presence, and was taken at the time and place specified in the enclosed notice.

In testimony whereof, I have herewith set my hand and notarial seal, this 8th day of March, A. D. 1881.

[SEAL.] WILLIAM SMITH,
Notary Public.

Fees for writing:

Deposition	$2 70
Seal	50
Witness	1 00
	$4 20

Rec'd payment of these fees in full of Mrs. Lydia M. Fussell, this 8th day of March, 1881.

WILLIAM SMITH,
Notary Public.

Depositions in a certain cause and bill in chancery, pending in the circuit court of the United States for the northern district of Ohio, western division, wherein Lydia M. Fussell is complainant and E. S. Hughes and others are defendants, and for the
56 defendants, taken in pursuance of the annexed notice, and at the time and place therein mentioned.

Present in behalf of defendants, W. H. West; present in behalf of complainant, Jeremiah Hall.

SAMUEL A. BUCHANAN, of Logan Co., of full age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed as follows:

By defendants' counsel:

1st Ques. State your name, residence, and occupation.

1st Ans. S. A. Buchanan; Bellefontaine, Ohio; civil engineering and surveying.

2nd Ques. What means have you had to become acquainted with the location of the several surveys and lots of land in the Virginia military district in Logan Co., Ohio?

2nd Ans. Under employment of the county commissioners of Logan county I prepared and superintended the preparation and making of maps and plats of all the lands in Logan county, in the years 1879 and 1880, for the use of the land assessors, showing therein the location of the original surveys and sections, and of the several farms into which the same have been subdivided, with the boundaries thereof; and thus necessarily became familiar with them.

3rd Ques. State what the plat or map now shown to you is, and annex it as an exhibit to this your deposition.

57 3rd Ans. The paper now handed me I now mark "A," and write my name upon it and annex it as an exhibit to this my

deposition. It is a plat or map of original Virginia military surveys, numbered 12017, 13593, and 14530, in said Logan county, showing their relative position to each other, and of the farms into which the last two are subdivided and now occupied.

The farm of E. S. Hughes embraces portions of both surveys 13593 and 14530, and is indicated upon the plat or map by the name of E. S. Hughes written thereon.

The farm of Esther Dennison and her children also embraces portions of the same surveys Nos. 13593 and 14530, and is indicated upon the plat or map by the name of Esther Dennison written thereon.

The farm of W. P. Hughes does not embrace any part of said survey No. 14530.

4th Ques. State what the several papers now handed you are—what lands they severally embrace—and annex them as exhibits to this your deposition.

4th Ans. The first paper now handed me, marked "B" and made an exhibit to my deposition, is a certified copy of a deed from Johnson Watson to Evan S. Hughes and Mary C. Hughes, dated April 13th, eighteen hundred and forty-six, conveying to them those portions of said surveys 13593 and 14530, indicated and marked
58 on the said plat by the name E. S. Hughes.

The second paper, marked "C," and made an exhibit to this my deposition, is a certified copy of a deed from Johnson Watson to William R. Watson, dated the 25th day of August, 1853, conveying to William R. Watson those portions of said surveys, 13593 and 14530, indicated and marked on the said plat by the name of Esther Dennison.

And the third paper, marked "D," and made an exhibit to this my deposition, is a certified copy of a deed from William R. Watson to Esther Dennison, dated the 8th of January, 1864, conveying to her the same lands, and indicated by her name, on the plat.

5th Ques. What does the number 16070, indicate on the annexed plat?

5th Ans. It indicates the location of original military survey, bearing that number, entered in the name of Daniel Gregg.

6th Ques. What conflict, if any, is there between surveys numbered 12017 and 14530?

6th Ans. The record shows an apparent conflict, but whether there be a conflict in fact, and if so, to what extent, can only be determined by tracing the original boundaries, and ascertaining the original monuments, by actual survey on the ground, which I have never done.

S. A. BUCHANAN.

59 Cross-examined by Jeremiah Hall:

1st Cross-Ques. State whether the east line of survey 13593, and the west line of survey 12017, are not the same line from the stake in Gordon's line called for by survey 13593, to the hickory and elm at the n. w. corner of survey 12017.

1st Ans. I think not, sir.

2nd Ques. Why not?

2nd Ans. Because the records do not prove it.

3rd Ques. State whether the south line of survey 13593, beginning at the stake in the line of the representations of David Aikin's survey 10387, 10388, running N. 78 E. with berline 100 poles, does not call to run to a stake in the line of Archibald Gordon's survey 12017?

3rd Ans. Yes.

4th Ques. Now, does not the east line of sur. 13593 call to begin at said stake in Gordon's line, and to run with Gordon's line N. 12 W. 240 poles, to a hickory and elm, N. W. corner to Gordon's said survey?

4th Ans. Yes.

5th Ques. Is not said line, so called for by survey 13593, so far as it runs with Gordon's line from the stake to the N. W. corner of survey 12017, the west line of Gordon's survey 12017, and the same line that bounds survey 13593 on the east?

5th Ans. So far as shown by facts contained in ques. 4, it would appear so.

60 6th Ques. Then, if Gordon's line bounds survey 13593 on the east, and the line of 13593, so far as it bounds Gordon's survey on the west, run together, are they not the same line?

6th Ans. Yes.

7th Ques. What land would an entry for fifty acres of land cover, beginning at the N. W. corner of survey 12017; thence to the S. W. corner thereof, and from the beginning equal distance, S. 78° W. for quantity?

7th Ans. It would be fifty acres of land on the west side of said line.

8th Ques. What land would be covered by a survey of fifty acres of land, beginning at the northwest corner of survey 12017; thence N. 78° E. 23 poles; thence S. 12° E. 228 poles to the line of survey 10387, 10388, passing a beech and large red oak at 114 poles; thence S. 78° W. 24 poles to the corner of survey 10387, 10388; thence N. 12° W. 60 poles to another corner of 10387, 10388; thence S. 78° W. 5 poles; thence with the line of survey 12017, N. 12° W. 228 poles to the beginning?

8th Ans. It would be land in 12017, or a portion of it.

Re-examination:

1st Ques. What knowledge have you that the recorded boundaries of survey 12017 correspond with the actual boundaries, as originally located on the ground?

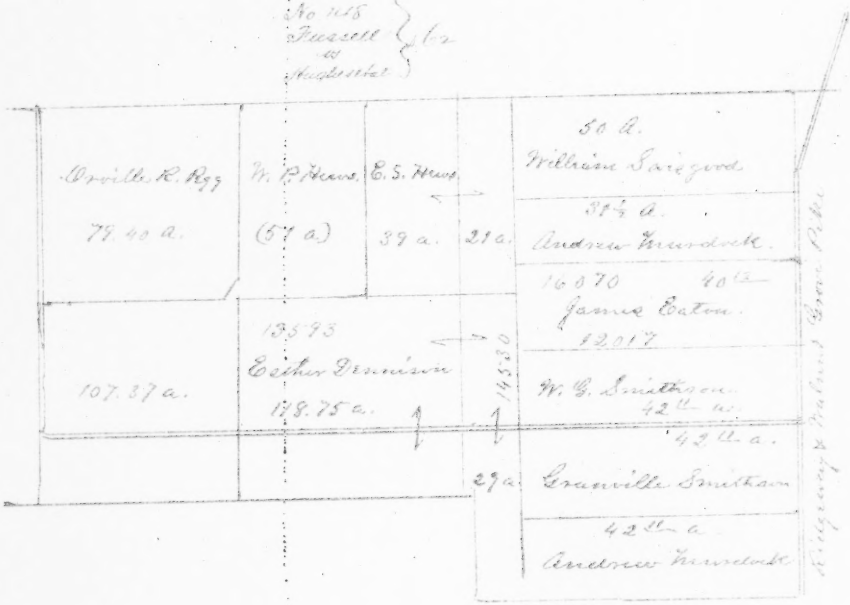
1st Ans. None.

2nd Ques. What knowledge have you that the recorded boundaries of survey 13593 correspond with the actual boundaries
61 and monuments, as originally surveyed and located on the ground?

2nd Ans. None.

3rd Ques. The south line of survey 13593 calls to run 100 poles

Exhibit "A"



March 18th 1881.

Plat of Survey 13593, 14530 and 16070, Logan County Ohio.

By S. A. Buchanen, Surveyor.

Fee $2.00

from Higgin's southeast corner to a stake in the west line of 12017; what knowledge have you that such stake was originally planted in said line?

3rd Ans. None.

4th Ques. What means have you of knowing the actual distance between Higgin's said southeast corner and the east line of survey 14530?

4th Ans. Plats made from Logan county land records; the distance, as shown by these, is about 265 poles.

5th Ques. What is the distance between said Higgin's southeast corner and the east line of said survey 15593?

5th Ans. About 236 poles.

6th Ques. What is the distance between the northeast corner of survey 14530, and the northeast corner of survey 16070?

6th Ans. 136 poles.

7th Ques. What is the distance between the northeast corner and the southeast corner of said survey 16070?

7th Ans. About 295 poles.

Complainants' counsel excepts to the 6th ques. and answer, and also to the seventh question and answer of re-examination; 1st, as incompetent; and, 2nd, as irrelevant.

S. A. BUCHANAN,
Sur. and Eng.

(Here follows diagram, marked p. 62.)

63 EXHIBIT "B."

Deed.

JOHNSON WATSON TO E. S. HEWS & WIFE.

Know all men by these presents, that I, Johnson Watson, of the county of Logan and State of Ohio, for and in consideration of the love and affection I bear to Evan S. Hewes and Mary C. Hewes, his wife, of the county and State aforesaid, have remised and released, and by these presents do hereby release and forever quit claim unto the said Evan S. Hews and Mary C. Hews, his wife, and their heirs and assigns forever, all my right, title, and interest, both legal and equitable, of, in, and to the following tract or parcel of land lying and being in the county of Logan and State of Ohio, and being part of surveys No. 13593 and No. 14530, entered and patented in the name of C. Wallace, and bounded and described as follows: Beginning at a stake in pond in Ridgway's line, N. E. corner to said Wallace's survey, and run S. 10¼ E. 116 poles to beech in Gordon's west line; thence S. 79¾ W. 85 poles to Dead Burr oak, in east edge of pond; thence N. 10¼ E. 116 poles to 3 beech in Ridgway's line; thence with said line N. 79¾ E. 85¼ poles, to the beginning, containing sixty acres.

To have and to hold all my right, title, and interest, both legal and equitable, of, in, and to the same, unto the said Evan S. Hews and Mary C. Hews, and their heirs and assigns, forever.

In testimony whereof, the said Johnson Watson has here-
64 unto set his hand and seal, this the 13th day of April, eighteen hundred and forty-six.

JOHNSON WATSON. [L. S.]

Executed and delivered in presence of—
WILLIAM WATSON.
A. A. HARBISON.

THE STATE OF OHIO, }
Logan County, } *ss:*

Personally appeared before me, an acting notary public, in and for the county and State aforesaid, the within-named Johnson Watson, and acknowledged the signing and sealing of the foregoing quit-claim deed to Evan S. Hews and Mary C. Hews, his wife, as his act and deed, for the uses and purposes therein contained.

As witness my hand and notarial seal, this 13th day of April, eighteen hundred and forty-six.

[SEAL.] A. A. HARBISON,
Notary Public.

Received for record Dec. 24th, 1846, and recorded Dec. 28th, 1846.

THE STATE OF OHIO, }
Logan County, } *ss:*

I, John A. Coulter, county recorder in and for Logan county, Ohio, do hereby testify the foregoing writing to be a true and correct copy of a deed from Johnson Watson to E. S. Hews & wife as recorded in records of deeds, volume "Q," at pages 127 *et* 128, Logan county land records.

65 In testimony whereof, I have hereunto set my hand and affixed my official seal, at Bellefontaine, O., March 17th, 1881.

[SEAL.] JOHN A. COULTER,
County Recorder, Logan County, Ohio.

EXHIBIT "C."

Deed.

JOHNSON WATSON to WILLIAM R. WATSON.

Know all men by these presents, that I, Johnson Watson, of the county of Logan, and State of Ohio, for and in consideration of the natural love and affection which I bear to my son, William R. Watson, and, also, the further consideration that the said William R. Watson (my son) shall furnish me comfortable food, raiment, and lodging during my natural life, do hereby bargain, sell, and convey to the said William R. Watson, (my son,) of the county of Logan, and State of Ohio, all the following described tract or parcel of land, lying and being in the county of Logan, and State of Ohio, and bounded and described as follows: On the waters of Rush creek, beginning at two ashes in the S. W. corner of Archibald Gordon's survey, No. 12017; thence with Gordon's line N. 10½ W. 289 poles to

a stake, northwest corner to his survey; thence S. 79½ W. 180 poles to a stake and large red oak; thence S. 10¾ E. 229 poles to a stake and two beeches; thence with David Aikin's line
66 N. 79½ E. 110 poles to a beech and ash; thence S. 10½ E. 60 poles to three ironwoods, white walnut, and hickory, corner to said survey; thence N. 79½ E. 44 poles to the beginning, containing two hundred and thirty-six acres and three-fourths of an acre; it being part of two surveys No. 13593 and 14530 as extended and patented to Cadwallader Wallace survey, and excepting therefrom sixty acres heretofore deeded to Evan S. Hews and Mary Hews, his wife, (formerly Mary Watson,) and also saving and excepting fifty-one acres (both these tracts conveyed to the two Hews', being out of the above tract of 236¾ acres,) heretofore conveyed to Washington P. Hews and Maria Hews, his wife, (formerly Maria Watson,) the said Mary Hews and Maria Hews being my daughters, and the conveyance to the said Evan S. Hews and wife and Washington P. Hews and wife was made by me as an advancement in full to them of their share of 236¾ acres of land as aforesaid; to have and to hold the said above-described tract of land (with the exception aforesaid) to the said William R. Watson, his heirs and assigns, forever, upon the conditions aforesaid; and the said Johnson Watson, for himself and his heirs, does hereby covenant with the said William R. Watson that the premises aforesaid are free and unencumbered; that he has good right, full power, and lawful authority to sell and convey the same in manner and form aforesaid, and that he will, and
67 his heirs, executors, and administrators shall forever, warrant and defend the same against the lawful claims of all persons whomsoever.

In testimony whereof, the said Johnson Watson has hereunto set his hand & affixed his seal, this 25th day of August, A. D. 1853.

[SEAL.] JOHNSON WATSON.

Signed, sealed, and acknowledged in presence of—
H. B. STROTHER.
WM. STOKES.

THE STATE OF OHIO, }
Logan County, } *ss:*

Before me, Hiram B. Strother, notary public within and for the county and State aforesaid, personally came Johnson Watson, the grantor in the foregoing conveyance, and acknowledged the signing and sealing of the same to be his voluntary act and deed for the uses and purposes therein contained and set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, at Bellefontaine, Ohio, this 25th day of August, A. D. 1853.

[SEAL.] H. B. STROTHER,
Notary Public, Logan County, Ohio.

Received & recorded Aug. 25th, 1853.

WILLIAM NEWELL,
Recorder.

68 THE STATE OF OHIO, } ss:
Logan County, }

I, John A. Coulter, county recorder in and for Logan county and State of Ohio, do hereby certify the foregoing to be a true and correct copy of a deed from Johnson Watson to William R. Watson, and recorded in records of deeds, volume number "Z," at pages 88 and 89, Logan county land records.

In testimony whereof, I hereunto set my hand and affix the seal of my office, at Bellefontaine, March 17, 1881.

[SEAL.]

JOHN A. COULTER,
County Recorder, Logan County, Ohio.

EXHIBIT "D."

WILLIAM R. WATSON and wife to ESTHER DENNISON.

Know all men by these presents, that William R. Watson and Matilda Watson, his wife, of the county of Logan and State of Ohio, for and in consideration of the sum of four thousand and sixty-four dollars, to them in hand paid by Esther Dennison, of the county of Marshall, and State of West Virginia, the receipt whereof they do hereby acknowledge, have given, granted, bargained, sold, aliened, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, convey, and confirm, unto the said Esther Dennison, her heirs and assigns, forever, the following premises, situate in the county of Logan and State of Ohio, and bounded and described as follows, to wit: All that tract of land on the
69 waters of Rush creek, in Rush creek township, and being part of Virginia military surveys No. 10337, 10338, 10387, and 10388, 14530, 13595, beginning at a point in Andrew Murdock's line; thence N. 10½ W. $178\frac{2}{10}$ poles to a beech, corner to Shelby Hews; thence S. 79½° W. $155\frac{4}{10}$ poles to a beech, corner to W. P. Hews, and in the line of Walter Sutton; thence S. 10½ E. $117\frac{2}{10}$ poles to a stone; thence N. 79½° E. $\frac{7}{10}$ of a pole to a beech; thence S. 106° E. 61 poles to a stone; thence N. 79½° E. $154\frac{7}{10}$ poles to the beginning, containing one hundred and seventy-two and three-fourths acres, more or less, except a lot deeded by said William R. Watson for a school-house, on the northwest corner of said tract of land, being bounded as follows, viz: Eight poles square, which said lot when it ceased to be used for school purposes, then it is to fall back to said Esther Dennison; to have and to hold the said granted premises, with all the appurtenances and privileges to the same belonging unto the said Esther Dennison, her heirs and assigns, forever; and the said William R. Watson and Matilda, his wife, for themselves and their heirs, doth hereby covenant with the said Esther Dennison, her heirs and assigns, that they are lawfully seized of the premises aforesaid; that they are free and clear from all incumbrances whatsoever, and that they will forever warrant and defend the same, with the appurtenances, to the said Esther Dennison, her heirs and assigns, against the lawful claims of all persons whomsoever.

70 In testimony whereof, the said William R. Watson and Matilda, his wife, hereunto set their hands and seals, this eighth day of January, in the year of our Lord one thousand eight hundred and sixty-four.

WILLIAM R. WATSON. [SEAL.]
MATILDA WATSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
WILLIAM F. SURRY.
CYRUS BELL.

[Five dollar U. S. excise stamp. W. R. W. Jan'y 8, 1864.]

THE STATE OF OHIO, }
Logan County, } *ss:*

Before me, John Atkinson, justice of the peace in and for said county, personally appeared the above-named William R. Watson and Matilda Watson, his wife, and acknowledged the signing and sealing of the above conveyance to be their voluntary act and deed, and the said Matilda Watson being at the same time examined by me, separate and apart from her said husband, and the contents of the said instrument made known to her by me, she then declared that she did voluntarily sign and seal and acknowledge the same; that she is still satisfied therewith.

Given under my hand officially, this eighth day of January, A. D. 1854.

JOHN ATKINSON, *J. P.*

Received and recorded January 22nd, 1864.

JOHN SHURR,
Recorder L. C. O.

71 THE STATE OF OHIO, }
Logan County, } *ss:*

I, John A. Coulter, county recorder in and for Logan county and the State of Ohio, do hereby certify the foregoing to be a true and correct copy of a deed from William R. Watson and Matilda Watson, his wife, to Esther Dennison, as recorded in record of deeds, volume 40, at pages 22 and 23, Logan county land records.

In testimony whereof, I have hereunto set my hand and seal of office, at Bellefontaine, March 17th, 1881.

[SEAL.] JOHN A. COULTER,
County Recorder.

Also at the same time and place came W. P. HEWS, of Logan county, of lawful age, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed as follows:

By defendants' counsel:

1st Ques. State your name, age, residence, and relationship to E. S. Hews.

1st Ans. W. P. Hews; age, 57 years; residence, Logan county, Ohio; and E. S. Hews was my brother.

2nd Ques. How near do you reside to Virginia military survey No. 14530, and how long have you resided there?

2nd Ans. I reside on survey 13593, immediately west of and adjoining survey 14530. I first moved on to it—that survey—about the year 1847.

72 3rd Ques. State if you were acquainted with Peter J. Sutton and Johnson Watson.

3rd Ans. Yes; I was.

4th Ques. State if you were acquainted with Peter J. Sutton and the said two surveys of land before he conveyed them to the said Johnson Watson?

4th Ans. Yes, sir; I was.

5th Ques. State if you know, what improvements, clearing, or deadening, Peter J. Sutton made on said surveys 13593 and 14530, or either of them, before he conveyed the same to Johnson Watson?

5th Ans. He had made a deadening on the surveys, but I don't know which of them it would have reached; probably both, as it was on the south part of the land.

6th Ques. Johnson Watson having conveyed about 60 acres, parts of these surveys, to the said E. S. Hews and wife in the spring of 1846, about how soon after the deed was made to him did he enter upon and commence improving the part so conveyed to him?

6th Ans. He commenced improving the same year of the conveyance, and a short time after it by deadening, as preparatory to clearing on said land.

7th Ques. On what part of the land so conveyed to him did he make his first improvement and erect his first dwelling-house?

7th Ans. He commenced clearing at or near to the east line, in the southeast part of his said tract; and he built his first house near the east line of his tract, about midway between his north and south lines.

73 8th Ques. From the time he entered upon and commenced improving the land so conveyed to him in 1846, in whose possession and occupancy has it continued to the present time?

8th Ans. The said E. S. Hews and family continued to reside upon and occupy the same from that time until his death, except one year he rented to me, and his son lived on it; at and since his death his family resided and have continued to reside until the present time.

9th Ques. Whilst your brother occupied and had possession of the said lands by himself or tenant who claimed to be the owner thereof and paid the taxes thereon?

9th Ans. E. S. Hews and his family, ever since Johnson Watson made the deed to him.

10th Ques. Do you know where the west line of survey 16070, known as Gregg survey, was; and if so, how near does it run to the land conveyed by Johnson to your brother, E. S. Hews, as you have above stated?

10th Ans. I know where it is claimed the west line of the said survey runs, and my brother's land runs up to it.

11th Ques. Do you know where the east line of said survey 14530 runs; if so, how does it correspond with the east line of the 60 acres, so as aforesaid conveyed by Johnson Watson to your brother, and upon which his family now resides?

11th Ans. I know where it is, and that it corresponds with the east line of the land so conveyed to my brother.

74 12th Ques. State, if you can, the extent of the improvements made by your brother and his family on said land?

12th Ans. It is all cleared up, except about six acres; all under fence; in a good state of cultivation; two good orchards; a comfortable, small dwelling-house; barns not very extensive.

13th Ques. State about how soon said Johnson Watson entered upon and commenced to improve said surveys 13593 and 14530 after Peter J. Sutton conveyed them to him.

13th Ans. I would say inside of six months after the conveyance to him.

14th Ques. What improvements did he make thereon and on what part of the tract?

14th Ans. He commenced improving that part of the tract lying right south of the part conveyed to my brother. At that time he built a double-cabin house; he cleared right along; built a comfortable frame barn soon after; and about the year 1850 or 1851 built a very comfortable brick house, now standing on the portion which he retained; planted out orchards and erected other outbuildings, and continued to own and occupy the same from the spring after it was conveyed to him by Peter J. Sutton until he conveyed it to his son, W. R. Watson, about the year 1853. William R. Watson then continued to hold possession of and to occupy it until about the year 1864, when he conveyed it to Esther Dennison, who then took possession of and occupied it, and has by herself and family occupied it ever since until the present time.

15th Ques. From whom did Johnson Watson obtain pos-
75 session of the said lands?

15th Ans. From Peter J. Sutton.

16th Ques. Under and from whom did William R. Watson obtain possession of his said tract?

16th Ans. From said Johnson Watson.

17th Ques. Under and from whom did Esther Dennison obtain possession of the same tract?

17th Ans. From William R. Watson.

18th Ques. From the time Johnson Watson obtained the deed for and took possession of the said two surveys, who occupied, claimed to be owner of, and paid taxes on the portion conveyed to W. R. Watson until said conveyance?

18th Ans. Said Johnson Watson.

19th Ques. From the time Wm. R. Watson obtained possession of his tract from Johnson Watson until he conveyed it to Esther Dennison, who occupied, paid taxes on, and claimed to be the owner of the same?

19th Ans. Said William R. Watson.

20th Ques. From the time said William R. Watson conveyed and

surrendered possession of said tract to Esther Dennison, who has continued to occupy, claim title to, and pay taxes on the same?

20th Ans. Esther Dennison and her two sons.

21st Ques. To whom did Johnson Watson convey the residue of said survey 13593, not conveyed to E. S. Hews and wife, and his son, William R. Watson?

21st Ans. To myself, W. P. Hews, about the same time he conveyed to my brother. I do not own any part of survey 14530, and never did, so far as I understand it.

76 Cross-examined by JEREMIAH HALL:

1st C. Ques. How much land in those two surveys, 13593 and 14530, is claimed by Mrs. Dennison?

1st Ans. I do not remember; but I presume the deed of William R. Watson to her will show.

2nd Ques. In what of those two surveys is her land situated?

2nd Ans. In the south part; extending, however, to the east line of 14530, and immediately south of E. S. Hews'.

3rd Ques. What is the situation of E. S. Hews' tract?

3rd Ans. Immediately north of Esther Dennison, east of W. P. Hews, and extending to the east line of 14530 and to the north line of both surveys.

4th Ques. Whereabouts does the road cross those two surveys, and in what direction?

4th Ans. The road known as the Block Line road was on the north line of those two surveys, east and west.

W. P. HUGHES.

And thereupon the taking of these depositions was adjourned until to-morrow, between the same hours.

THOS. S. BROWN, *N. P.*

March 21st, 1881.

TUESDAY, *March 22nd*, 1881.

At 8 o'clock a. m., at same place, came ANDREW MURDOCK, of lawful age, who, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposes as follows:

77 1st Ques. What is your age, residence, and how long have you resided there?

1st Ans. I am sixty-four years old, and have resided, for thirty-three years, about three hundred rods south of survey 16070.

2nd Ques. Did you know Johnson and surveys 13593 and 14530, conveyed to him by Peter J. Sutton?

2nd Ans. I knew Johnson Watson; I knew the said surveys so conveyed to him.

3rd Ques. Where, or on what part of said surveys, if any, did said Johnson Watson reside when you first settled in that vicinity?

3rd Ans. When I removed there, thirty-three years ago, he resided on the south part, probably about half a quarter from the line.

4th Ques. Have you any knowledge how long he had then been residing thereon?

4th Ans. From the appearance of his improvements, I would judge he had been residing there about two years.

5th Ques. To whom did he afterwards convey the lands so by him then owned and occupied?

5th Ans. To William R. Watson.

6th Ques. Where did he continuously reside from the time you first knew him, thirty-three years ago, until he conveyed said tract to William R. Watson?

6th Ans. On the same premises.

7th Ques. Who claimed to be the owner of the said premises during all of said time?

7th Ans. Father Johnson Watson.

8th Ques. What improvements did he make on said south part of surveys 13593 and 14530, so by him occupied and conveyed to William R. Watson?

8th Ans. From the time I first became acquainted with it
78 until it fell into the hands of William R. Watson, the whole farm was under fence, and I think there must have been full forty acres cleared at that time. He planted a tolerably good orchard. His first house was a good double cabin. He built a barn and other out-buildings. He also erected a brick residence thereon.

9th Ques. Where was his east fence located with reference to the west line of survey No. 16070, parts of which are now owned by you and Smithson and others?

9th Ans. It was right along the west end of what we claim now—Smithson and I.

10th Ques. From the time Father Watson conveyed and gave possession to William R. Watson until the latter conveyed to Esther Dennison who occupied and claimed to be the owner of these same premises?

10th Ans. William R. Watson; and after he sold to and gave possession to Mrs. Dennison, she and her children occupied and claimed title to them ever since.

11th Ques. State if you know the tract of sixty acres, part of surveys 13593 and 14530, conveyed by Johnson Watson to E. S. Hewes?

11th Ans. I do, and have ever since I have resided in the neighborhood.

12th Ques. Who continued to reside on and claim title to the said sixty acres from the time you first became acquainted with the tract until the present time?

12th Ans. Johnson Watson first owned and occupied it; then he made deed to his son-in-law, E. S. Hewes, and his wife, Mary
79 C. Hews; they continued to occupy it from that time until his death, and his widow and family have since his death continued to occupy the same until to-day.

13th Ques. What improvements did E. S. Hewes make on said 60 acres?

13th Ans. He put it all under fence, cleared up from thirty to forty acres; the first built a hewed log house on the east end of the tract, afterwards built another on the west part, which I understand is hewed log, weatherboarded; he first planted a small orchard on the east end, and afterwards a small one on the west part.

14th Ques. When was the east fence of said 60-acre tract, with reference to the west line of the Gregg survey, parts of which are now owned by William Swissgood, James Higgins, and others?

14th Ans. The east fence of the Hews 60-acre tract is the west line of Swissgood and Higgins' part of said survey.

Cross-examined by JEREMIAH HALL:

1st Ques. That first house built by Hews; how far was it built from the Gregg line?

1st Ans. About from 60 to 100 yards; I cannot be positive; that house is not there now.

2nd Ques. How far is his present house west of the Gregg line?

2nd Ans. It is something near a quarter of a mile.

3rd Ques. How near is it to the road which passes on the North Block line?

3rd Ans. I would suppose from 40 to 50 yards.

80 4th Ques. Is there any timber land on this land immediately west of the line of survey No. 16070?

4th Ans. There is some timber there.

5th Ques. How far from the west line of 16070 is Mrs. Dennison's brick house?

5th Ans. I presume the brick house is something near a quarter of a mile.

6th Ques. Is there any buildings then, on survey 14530, at present?

6th Ans. There are none.

7th Ques. Is there any woodland along that line between Mrs. Dennison's house and the Gregg line?

7th Ans. There is.

8th Ques. How much cleared land is there, if any, on survey 14530?

8th Ans. There is a little cleared land on the Hews tract where the first house was built, and a little on that survey east of Mrs. Dennison's house, but I cannot say how much.

9th Ques. Are we then to understand that there are no valuable improvements on survey 14530?

9th Ans. So far as buildings, there are none. As to the clearing, I am not able to state. I can say it is not extensive.

ANDREW MURDOCK.

Also, at the same time and place, came William Swissgood, of lawful age, who, being first by me duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed as follows:

By defendants' counsel:

1st Ques. What is your age and residence, and what is the
81 relation you sustain to this suit?

1st Ans. I am sixty-four years old; I live about 230 rods from the north end of survey 16070; and am one of the defendants in this suit.

2nd Ques. How long have you resided where you now do?

2nd Ans. Thirty-three years this spring.

3rd Ques. Do you know the Gregg survey number 16070?

3rd Ans. I do.

4th Ques. Do you know the survey immediately west of it, known as 14530?

4th Ans. I do.

5th Ques. Do you know survey 13593, lying immediately west of the one last named?

5th Ans. I do.

6th Ques. Do you remember when E. S. Hews and wife resided on the sixty-acre tract, conveyed to him and his wife by Johnson Watson, embracing parts of the north ends of said surveys 13593 and 14530?

6th Ans. I do.

7th Ques. Where did E. S. Hews and wife reside thirty-three years ago?

7th Ans. In the house or cabin they first built on the east part of the said sixty-acre tract. They continued to reside there until they built a new house, on the northwest part of that tract, where they continued to reside until his death, and where his widow and family have continued to reside ever since.

8th Ques. Who claimed to be the owner of said sixty-acre tract during the lifetime of said E. S. Hews, and who have claimed
82 to be the owners thereof.

8th Ans. E. S. Hews and wife claimed to be the owners of it during his lifetime, and she and their children have claimed to be the owners of it since.

9th Ques. What improvements did E. S. Hews make on said tract?

9th Ans. He put it all under fence; planted two small orchards; erected two log houses, the last of which is weatherboarded.

10th Ques. Where is his east fence, with reference to the west line of the Gregg survey 16070?

10th Ans. His east fence is the west line of the Gregg survey.

11th Ques. What improvements, if any are, on the east end of said Hews sixty-acre tract, other than the fences enclosing it?

11th Ans. It is all cleared except 8 or ten acres, which 8 or ten acres have been underbushed, and are well set in pasture.

12th Ques. Where did Johnson Watson reside thirty-three years ago?

12th Ans. He resided on that tract of land which he afterwards conveyed to William R. Watson.

13th Ques. From whom did he purchase said tract, and where was it situated with reference to the Gregg survey 16070?

13th Ans. I do not know from whom he obtained it. It lies immediately west of survey 16070.

14th Ques. What fencing did he make on the said tract and other improvements?

14th Ans. I cannot state if it was all under fence in the old
83 man's time or not. He first erected his cabins, then a frame barn, and afterwards a brick dwelling; planted an orchard; I think he sunk a couple of wells and made other improvements.

15th Ques. Where was his east line with reference to the west line of the Gregg survey 16070?

15th Ans. His east line was the west line of the Gregg land, as we called it.

16th Ques. How near the west line of the Gregg survey did Johnson Watson's improvements extend?

16th Ans. A part of it was fenced up to the Gregg line, but I am not sure if it all was.

17th Ques. Thirty-three years ago and until that tract was conveyed to William R. Watson, who continued to occupy and claim title to it?

17th Ans. Johnson Watson.

18th Ques. After he conveyed and gave possession of it to William R. Watson, who continuously occupied and claimed title to it since?

18th Ans. William R. Watson, until he sold and rendered possession to Esther Dennison, since which time she has.

Cross-examined by JEREMIAH HALL:

1st Ques. State what lasting and valuable improvements, if any, have been made upon survey 14530.

1st Ans. A portion of it is cleared and is plow-land; a portion of it is timber. I think there are no buildings whatever. There is a well. It is under good fence, and some good underground drain in it.

84 2nd Ques. About what time did you learn there was such a survey as 14530 there?

2nd Ans. I do not remember.

3rd Ques. Did you learn of it previous to this suit?

3rd Ans. No, I don't think I ever heard anything of this survey previous to this suit.

4th Ques. How soon after you went there to live did you learn the situation of the A. Gordon survey 12017, and that there was such a survey?

4th Ans. I had been in the country some time, I do not know how long, when I first heard Gordon's name connected with the land.

5th Ques. Was anybody in possession of the Gordon survey when you first knew it?

5th Ans. There was a man lived on the north part named Eleazer Wallace, a son-in-law of William Trent.

Re-examination:

1st Ques. When did you first learn there was a Wallace survey out there, without regard to its number?

1st Ans. About the spring of 1850.

2nd Ques. Do you remember the surveys by their numbers, or by their names?

2nd Ans. By their names.

Recross-examination:

1st Ques. Did you learn*ed* there was a Gordon survey there before you learned there was a Wallace survey?

1st Ans. I learned there was a Wallace survey first.

WM. SWISSGOOD.

85 Also, at the same time and place, came ALEXANDER DENNISON, of full age, who, being duly sworn by me to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposes as follows:

1st Ques. State your age, and where you reside, and how long you have lived there.

1st Ans. I am forty-six years old. I reside on the tract of land conveyed from William R. Watson to my mother, Esther Dennison, in Bokes Creek township, Logan county, O., and have ever since said conveyance, where my mother has also resided during the same time.

2nd Ques. Who gave possession of this tract to your mother, and who has continued to pay the taxes thereon since then?

2nd Ans. William R. Watson gave my mother possession, and she and her boys have been paying the taxes ever since.

3rd Ques. Where is said tract, with reference to surveys 13593 and 14530?

3rd Ans. I do not know the surveys by their number. The Wallace survey is one of them.

4th Ques. Which side of the Gregg survey, now owned by Andrew Murdock, W. G. Smithson, and others, is your mother's said tract?

4th Ans. Adjoining, on the west side.

86 Cross-ex. by J. HALL:

1st Ques. Has your mother any cleared land along the west line of the Gregg survey?

1st Ans. Yes; that part of survey 14530 lying south of the road, which runs east and west through the farm, is all timber; that part lying north of the road, about ten acres, is cleared land and underbrushed, and well set in clover and timothy. It is all under fence, but was not so when we went there.

2nd Ques. At what time was it put under fence?

2nd Ans. About 1865 we fenced in that south of the road; that part north of the road we fenced in about 11 years ago this winter.

3rd Ques. Has your mother any buildings or orchards on that survey, the disputed land?

3rd Ans. There are none.

4th Ques. What do you know about the improvements on the disputed land at the east end of the Hews tract?

4th Ans. About 8 acres of wood pasture, a little scattered timber over it, well set in pasture; all the balance is cleared up, under cultivation, with an orchard upon it. There are no buildings now on the east end; but it is all enclosed.

ALEXANDER DENNISON.

Thereupon the taking of these depositions was adjourned until to-morrow at the same time and place.

THOS. S. BROWN, *N. P.*

87 WEDNESDAY MORNING, *March 23rd*, 1881.

At 8 o'clock a. m., at the same place, came JOHN A. COULTER, of Logan county, and of lawful age, who, being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposed as follows:

By defendants' counsel:

1st Ques. State your official position.

1st Ans. County recorder of Logan county, Ohio, and as such have custody of the records of deeds and land titles of and within said county.

2nd Ques. Examine the papers annexed to S. A. Buchanan's deposition herein, and marked "B," "C," and "D," and state what they are.

2nd Ans. They are severally compared copies of deeds which are of record in said land records, and were by me truly taken and correctly copied from the said records, and compared therewith. To each of said copies is attached my official certificate, signature, and seal.

JOHN A. COULTER.

And thereupon the taking of these depositions was adjourned until to-morrow at and between the same hours, and at the same place.

THOS. S. BROWN, *N. P.*

THURSDAY, *March* 24, 1881—8 o'clock a. m.

At the same place came FINLEY R. MCLAUGHLIN, of lawful age, who, being first by me duly sworn to tell the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposes as follows:

88 By defendants' counsel:

1st Ques. What official pssition do you hold?

1st. Ans. The office of county auditor of Logan county, Ohio, and as such I have custody and charge of the land duplicates, showing the listing and assessment of land in said county from its organization.

2nd Ques. Will you prepare copies of the entries of the lands

listed and assessed for taxation on said duplicates in the year 1844, and each succeeding year since then, showing in whose name the land contained in Virginia military survey 14530 were listed for taxation in each of said years, and by whom the taxes thereon have been paid, especially what lands in each of said years were listed in the name of and charged on said duplicates against Calwell[illegible] Wallace, Peter J. Sutton, Johnson Watson, E. S. Hews, William R. Watson, and Esther Dennison, or either of them, in connection with said survey 14530?

2nd Ans. I will copy such entries and furnish a certified table and statement thereof to the notary, to be by him attached as an exhibit to this my deposition.

F. R. McAUGHLIN.

89 *Lands in the Virginia Military District in Bale's Creek Township Listed for Taxation on the Grand Duplicate of Logan County, Ohio, for the several years from 1844 to 1880, both inclusive.*

	Owners' names.	Total tax.	Acres listed.	In what survey situate.
1844	C. Wallace	12 36	303.75	13593 and 14530, transferred to P. J. Sutton; 250[illegible] acres transferred to Johnson Watson.
1845	Peter J. Sutton	15 65	303.25	13593 and 14530.
1846	Johnson Watson	7 94	296.75	13593 and 14530, 60 a. le. to E. S. Hews and 51 a. to W. R. Hews.
1847	Johnson Watson	3 34	125.75	13593 and 14530.
1847	Evan S. Hews	1 18	60.	13593 and 14530.
1848	Johnson Watson	6 59	125.75	13593 and 14530.
1848	Evan S. Hews	1 63	60.	13593 and 14530.
1849	Johnson Watson	2 97	125.75	13593 and 14530.
1849	Evan S. Hews	3 54	60.	13593 and 14530.
1850	Johnson Watson	3 05	125.75	13593 and 14530.
1850	Evan S. Hews	1 14	60.	13593 and 14530.
1851	Johnson Watson	3 63	125.75	13593 and 14530.
1851	Evan S. Hews	1 71	60.	13593 and 14530.
1852	Johnson Watson	3 79	125.75	13593 and 14530.
1852	Evan S. Hews	1 79	60.	13593 and 14530.
1853	Johnson Watson	13 90	125.75	13593 and 14530; transferred to W. R. Watson.
1853	Evan S. Hews	2 10	60.	13593 and 14530.
1854	W. R. Watson	17 11	125.75	13593 and 14530.
1854	Evan S. Hews	5 18	60.	13593 and 14530.
1855	Wm. R. Watson	32 37	125.75	13593 and 14530.
1855	Evan S. Hews	9 80	60.	13593 and 14530.
1856	Wm. R. Watson	10 54	125.75	13593 and 14530.
1856	Evan S. Hews	3 19	60.	13593 and 14530.
90				
1857	Wm. R. Watson	16 18	125.75	13593 and 14530.
1857	Evan S. Hews	3 78	60.	13593 and 14530.
1858	Wm. R. Watson	16 18	125.75	13593 and 14530.
1858	Evan S. Hews	4 90	60.	13593 and 14530.
1859	Wm. R. Watson	17 48	125.75	13593–14530
1859	Evan S. Hews	5 29	60.	13593–14530
1860	Wm. R. Watson	32 48	125.75	13593–14530
1860	Evan S. Hews	10 71	60.	13593–14530
1861	Wm. R. Watson	27 16	125.75	13593–14530

Lands in the Virginia Military District, &c.—Continued.

	Owners' names.	Total tax.	Acres listed.	In what surveys situate.
1861	Evan S. Hews	14 30	60.	13593-14530
1862	Wm. R. Watson	24 70	125.75	13593-14530
1862	Evan S. Hews	8 11	60.	13593-14530
1863	Wm. R. Watson	32 76	125.75	13593-14530. tr. to E. Dennison 47 acres from surveys 10387-10388.
1863	Evan S. Hews	10 80	60.	13593-14530
1864	Esther Dennison	31 66	172.75	13593-14530-10387-10388
1864	Evan S. Hews	9 54	60.	13593-14530
1865	Esther Dennison	30 35	172.75	13593-14530-10387-10388
1865	Evan S. Hews	13 80	60.	13593-14530
1866	Esther Dennison	30 25	172.75	13593-14530-10387-10388
1866	Evan S. Hews	8 22	60.	13593-14530
1867	Esther Dennison	28 21	172.75	13593-14530-10387-10388
1867	Evan S. Hews	10 52	60.	13593-14530
1868	Esther Dennison	54 57	172.75	13593-14530-10387-10388
1868	Evan S. Hews	14 94	60.	13593-14530
1869	Esther Dennison	50 67	172.75	13593-14530-10387-10388
1869	Evan S. Hews	14 22	60.	13593-14530
1870	Esther Dennison	61 80	172.75	13593-14530-10387-10388
1870	Evan S. Hews	17 01	60.	13593-14530
1871	Esther Dennison	47 87	172.75	13593-14530-10387-10388
1871	Evan S. Hews	13 55	60.	13593-14530
1872	Esther Dennison	59 27	172.75	13593-14530-10387-10388
91				
1872	Evan S. Hews	11 45	60.	13593-14530
1873	Esther Dennison	50 86	172.75	13593-14530-10387-10388
1873	Evan S. Hews	14 82	60.	13593-14530
1874	Esther Dennison	43 01	172.75	13593-14530-10387-10388
1874	Evan S. Hews	12 54	60.	13593-14530
1875	Esther Dennison	48 99	172.75	13593-14530-10387-10388
1875	Evan S. Hews	14 28	60.	13593-14530
1876	Esther Dennison	50 30	172.75	13593-14530-10387-10388
1876	Evan S. Hews	14 66	60.	13593-14530
1877	Esther Dennison	56 10	172.75	13593-14530-10387-10388
1877	Evan S. Hews	16 35	60.	13593-14530
1878	Esther Dennison	42 01	172.75	13593-14530-10387-10388
1878	Evan S. Hews	12 53	60.	13593-14530
1879	Esther Dennison	41 64	172.75	13593-14530-10387-10388
1879	Evan S. Hews	11 96	60.	13593-14530
1880	Esther Dennison	47 06	172.75	13593-14530-10387-10388
1880	Evan S. Hews	13 19	60.	13593-14530

92 STATE OF OHIO, }
Logan County, } *ss:*

I, Finley R. McLaughlin, auditor of said county, do hereby certify that all the land contained in Virginia military survey No. 14530, in Boke's creek township, was listed for taxation on the grand duplicate of said county, in the several years from the year 1844 to the year 1880, both inclusive, and that taxes were assessed thereon and paid for each and every year of said period, as appraised from the said duplicate. I further certify that the persons whose names appear in the several columns of the foregoing table are the persons

against whom the said lands were listed on said duplicates, and by whom the said taxes were paid for each of said years; that the amount opposite each name in the column headed "Total Tax"; that the number of acres opposite each name in the column headed "Acres Listed," and that the number of the surveys opposite each name in the column headed "In what Survey Situate," are truly taken and correctly copied from the said duplicates for the several years indicated in said table, and stand opposite the same names thereon, and show, first, the total amount of taxes charged against said person; second, the number of acres on which said taxes were levied; and third, the several surveys within which the lands so listed are situate.

93 In testimony whereof, I have hereunto set my hand and affixed my official seal, at Bellefontaine, Ohio, this twenty-fourth day of March, one thousand eight hundred and eighty-one.

[SEAL.] F. R. McLAUGHLIN,
Auditor Logan County.

The foregoing is the table furnished by Finly R. McLaughlin, auditor of Logan Co., in response to the last answer of his deposition.

THOMAS S. BROWN,
Notary Public, Logan Co., Ohio.

I, Thos. S. Brown, notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the abovenamed S. A. Richardson, W. P. Hews, Wm. Swysgood, A. Murdock, John A. Coulter, A. Dennison, and F. R. McLaughlin by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by me, who is not interested in the suit, in my presence and in the presence of the witnesses respectively, and were subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice specified, and were continued from day to day as above

94 set forth; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal, this twenty-fourth day of March, A. D. 1881.

[SEAL.] THOS. S. BROWN,
Notary Public.

95 Depositions taken before me, L. F. Davy, a notary public within and for the county of De Witt, in the State of Illinois, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the defendants in an action pending in the circuit court of the United States, northern district of Ohio, northern division, in which Lydia M. Fussell is plaintiff and E. S. Hughes *et al.* are defendants.

PETER J. SUTTON, of lawful age, being by me first duly sworn, as heretofore certified, deposes and says, as follows:

1 Q. State your name, age, occupation, and place of residence.

A. Peter J. Sutton; age, sixty-three; occupation, farming; residence, De Witt county, Illinois.

2 Q. Before you moved to Illinois where did you reside; and if you say you lived in Ohio, how long did you live in Ohio before you came to Illinois, and in what part of Ohio?

A. I lived in Ohio twenty-nine years, most of the time in Logan county. The last two years and a half in Hardin county.

3 Q. If you bought any land in Ohio please give the number of the survey, the number of acres as nearly as you can.

A. I bought two surveys, numbered 14530 and 13593, the two containing three hundred and ninety-three (393) acres.

4 Q. When and of whom did you buy survey No. 14530?

A. I bought that survey of Calwallader Wallace about two
96 months before the date of the deed, and my deed is dated October 14th, 1844, a copy of which said deed is hereto attached, marked "A," and made a part of this my deposition.

5 Q. State what occupancy, if any, and what improvements you put upon this survey No. 14530 after the date of said deed, and the value thereof.

A. I deadened about sixty acres of land on the two surveys; I think about half on survey No. 14530; I suppose the improvements I put on this survey should be valued at thirty (30) dollars.

6 Q. How long after you got this deed was it that you put on these improvements?

A. I think it was about ten or twelve months.

7 Q. Why was it that you put these improvements upon this land?

A. Because I had bought it and paid my money for it, and intended making a farm of it.

8 Q. How long did you own this survey?

A. I think I was the owner of it for about two years, when I conveyed it to Johnson Watson.

9 Q. Were your improvements such that anybody passing by them could see them?

A. Yes, sir.

10 Q. In what condition were the boundaries of said survey, marked or not marked?

A. They were marked with axe marks, so that they were plainly to be seen.

11 Q. Could or could not any person follow the line of this survey without seeing your improvements?

A. They could not.

12 Q. While you owned this land what claim to it did you make?

97 A. I claimed it in fee simple, conveyed to me by Cadwallader Wallace, and he when he conveyed it to me, gave me the papers to it from the Government.

13 Q. Did any other person make any claim to this land while you owned it adverse to yours?

A. No, sir.

14 Q. How long did you know this survey after you bought it of Cadwallader Wallace?

A. For about eleven years.

15 Q. During all of that time, if you heard of any person making a claim adverse to your title and the title you made Johnson Watson, please state who it was, and when you first heard of it.

A. I never heard of anybody's claiming the land until this suit was commenced.

16 Q. How long did Watson occupy the land after you sold it to him?

A. He occupied it until his death, and his children now occupy it.

17 Q. If you paid any taxes on this land, state when it was.

A. I paid all the taxes due until I conveyed it.

18 Q. Why was it that you paid the taxes on it, and why was it you sold and made the kind of deed you did to Johnson Watson?

A. Because I saw the patent from the Government to Cadwallader Wallace, and Cadwallader Wallace had made me a general warranty deed, and I supposed I owned the land beyond a question, and that nobody could have any interest in the land adverse to mine.

19 Q. To whom did you sell and convey the land, and to whom did you give possession?

A. I sold and conveyed this survey, No. 14530, to Johnson
98 Watson by deed of general warranty, dated the 9th day of January, A. D. 1846, a copy of which is hereto attached, marked "B," and made a part of my deposition, and he immediately thereafter took possession of the land and all my improvements thereon, and continued in possession up to the time of his death.

20 Q. What improvements do you know of Watson putting on the land after he took possession.

A. He built a house and a barn, and cleared and fenced the land.

21 Q. How long before you started for the State of Illinois was it that you saw this land for the last time?

A. Something in the neighborhood of a month.

22 Q. Who occupied it then, and what claim did he make to the land?

A. Johnson Watson occupied the land, and he claimed he owned it by virtue of a deed from me.

23 Q. State if you know anything further about the land since you left the State of Ohio until this suit was commenced, and if you ever heard of anybody's claiming the land, or any title to it, or any part of it, from the time you bought it up to the commencement of this suit.

A. I have not seen the land since I moved to Illinois, and never heard of any claimant for it, or any part of it, from the time I bought it until I was notified of the commencement of this suit.

PETER J. SUTTON.

99 "A."

CADWALLADER WALLACE to PETER J. SUTTON.

This indenture, made this 14th day of October, in the year of our Lord one thousand eight hundred and forty-four, between Cadwallader Wallace and Ruth, his wife, of the county of Ross, in the State of Ohio, party of the first part, and Peter J. Sutton, of the county of Logan and State aforesaid party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of six hundred dollars, to them in hand paid, the receipt whereof is hereby acknowleged, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, all that tract or parcel of land situate, lying, and being on the waters of Rush creek, in the county of Logan, in the State of Ohio, bounded and described as follows, to wit: Beginning at an ash and two beeches, northeast corner to James Higgins survey No. 10837; thence S. 10½ E. 229 poles to a stake and beech, southeast corner to said survey, in the line of David Aikin's survey No. 10387 and 10388; thence with Aikin's line N. 79½ E. 220 poles to two beeches and an ash, corner to said survey; thence S. 10½ E. 60 poles to a white walnut and hackberry, corner to said survey; thence N. 79½ E. 44 poles to two ashes in the line of said survey, corner to Archibald Gordon's survey No. 12017; thence with Gordon's line N. 10½ W. 289 poles to a stake, northwest corner to his survey; thence S. 79½ W. 264 poles to the beginning, containing
100 three hundred and ninety-three acres by survey, and being the whole of the surveys No. 13593 of 150 acres and No. 14530 of 50 acres, granted unto Cadwallader Wallace by patents; which said patents are with this conveyance now delivered to the party of the second part.

To have and to hold the said tract of land, with all the privileges and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, his heirs and assigns, forever; and the said party of the first part, for themselves, their heirs, executors, and administrators, will warrant and forever defend the said premises herein and hereby granted unto the said party of the second part, his heirs and assigns, against the lawful claims of all and every person.

In witness whereof, the said party of the first [part] have hereunto set their hands and seals the day and year first above written.

CADWALLADER WALLACE. [SEAL.]
RUTH WALLACE. [SEAL.]

Signed, sealed, and delivered in the presence of—
DANIEL OTT.
CRANDTHA WALLACE.

THE STATE OF OHIO, }
Ross County, } *ss:*

Before me, the undersigned, a justice of the peace in the county

aforesaid, this day personally appeared Cadwallader Wallace and Ruth, his wife, the above-named grantors, and acknowledged the above to be their voluntary act and deed, and the said Ruth, wife of the said Cadwallader, being at the same time examined separate and apart from her said husband, and the contents of said deed being made known and explained to her by me, she there declared that she did voluntarily and of her own free will and accord,
101 without any fear or coercion of her said husband, sign, seal, and acknowledge the same, and that she is satisfied therewith.

In testimony whereof, I have hereunto set my hand and seal, this 14th day of October, in the year of our Lord one thousand eight hundred and forty-four.

DANIEL OTT,
Justice of the Peace.

Received for record May 6th, and recorded May 21st, 1845.
H. B. STROTHER, *Recorder.*

STATE OF OHIO, } ss:
Logan County, }

I, John A. Coulter, recorder within and for said county, hereby certify that the foregoing deed is truly taken and copied from volume "O," pages 364 and 365, of the deed records of said county.

In testimony whereof, I hereunto set my hand, and affix my official seal, at Bellefontaine, this 15th day of May, A. D. 1880.

JOHN A. COULTER,
Recorder, Logan County, Ohio.

"B."

Deed.

PETER J. SUTTON to JOHNSON WATSON.

Know all men by these presents, that we, Peter J. Sutton and Nancy A. Sutton, my wife, in consideration of one thousand dollars, paid by Johnson Watson, have, and do hereby bargain, sell, and convey unto said Johnson Watson, and unto his heirs and as-
102 signs, forever, the following premises in Logan county, Ohio, on the waters of Rush creek: Beginning at the ashes in the s'west corner of Archibald Gordon's survey No. 12017; thence with Gordon's line N. 10½ W. 289 poles to a stake, northwest corner to his survey; thence S. 79½ W. 289 poles to a stake, northwest corner to his survey; thence S. 79½ W. 180 poles to a stake and large red-oak; thence S. 10½ E. 229 poles to a stake and two beeches; thence with David Aikin's line N. 79½ E. 110 poles to a beech and ash; thence S. 10½ E. 60 poles to three ironwood, white walnut, and hackberry, corner to said survey; thence N. 79½ E. 44 poles to the beginning, containing two hundred thirty-six acres and three-fourths of an acre, it being part of two surveys, No. 13593 and 14530, as entered and patented to Cadwallader Wallace.

To have and to hold said premises, with their appurtenances unto

said Johnson Watson, his heirs and assigns, forever; and said Peter J. Sutton and Nancy A., his wife, for themselves, their heirs and assigns, doth hereby covenant with said Johnson Sutton, his heirs and assigns, that they will forever warrant and defend said premises, with the appurtenances, against the claims of all persons whomsoever.

In witness whereof, the said Peter J. Sutton and Nancy A. Sutton, his wife, have hereunto set their hands and seals, this ninth day of January, in the year of our Lord eighteen hundred and forty-six.

PETER J. SUTTON. [SEAL.]

her
NANCY A. x SUTTON. [SEAL.]
mark.

Executed in presence of us—
WM. McAMIS.
ABRAHAM DEARDORFF.

103 THE STATE OF OHIO, }
Logan County, } *ss:*

Before me, Wm. McAmis, one of the justices of the peace in and for said county, personally came Peter J. Sutton and Nancy A. Sutton, his wife, grantors to the within deed of conveyance, and acknowledged the signing and sealing of the same to be their free and voluntary act and deed for the purposes therein expressed, the contents of the said deed being made known and explained to said *Mary* A., wife of said Peter S. Sutton, separate and apart from her said husband, she declared that she now doth sign and seal the same without fear or coercion of her said husband, and that she is still satisfied therewith.

Given under my hand and seal, this 9th day of October, 1846.

WM. McAMIS, *J. P.*

Received for record June 1st, 1846, and recorded June 11th, 1846.

H. B. STROTHER,
Recorder.

THE STATE OF OHIO, }
Logan County, } *ss:*

I, John A. Coulter, recorder within and for said county, do hereby certify that the foregoing deed is truly taken and copied from vol. P, page- 372 and 373, of the deed records of said county.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, at Bellefontaine, this 15th day of May, A. D. 1880.

[SEAL.]

JOHN A. COULTER,
Recorder Logan County, Ohio.

104 THE STATE OF ILLINOIS, }
De Witt County, } *ss:*

I, L. F. Day, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the

above-named Peter J. Sutton was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by me—I being a proper person and not interested in the suit—in my presence, and in presence of the witness, and was subscribed by said witness in my presence, and was taken at the time and place in the annexed notice specified, and continued from day to day as above set forth.

I do further certify that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

In witness whereof, I have hereunto set my hand and notarial seal, this 10th day of June, A. D. 1880.

[SEAL.]

L. F. DAY,
Notary Public.

Endorsed: Filed June 12th, 1880.

105 *Pension Certificate.*

N. S. A. I.

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *May* 31, 1881.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of a paper on file in this Department.

In witness whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

WILLIAM WINDOM,
Secretary of the Treasury.

BRANCH BANK OF THE UNITED STATES.
BALTIMORE, *7th September*, 1829.

Received of William Patterson, president, agent for paying pensions, forty-eight dollars —— cents, being for six months' pension, due to Archibald Gordon, from the 4th day of March, 1829, to the 4th day of September, 1829, for which I have signed duplicate receipts.

$48. JOHN SHARPLEY.

STATE OF MARYLAND, *Baltimore City,* } *ss:*

Be it known that on the 7th day of September, 1829, before the subscriber, a justice of the peace in and for Balto. county and city, personally appeared John Sharpley, the attorney named in the annexed power of attorney, and made oath that the same was not given to him by reason of any sale, transfer, or mortgage of the pension, or arrears of the pension therein authorized to be received by him.

JOHN SHARPLEY.

106 Sworn and subscribed, the day and year last above mentioned, before me.

W. L. GILL, *J. P.*

STATE OF MARYLAND, } ss:
Cecil County, }

Be it known that before me, James Purnell, a justice of the peace in and for the county aforesaid, personally appeared Archibald Gordon and made oath in due form of law that he is the identical Archibald Gordon named in an original certificate in his possession, of which I certify the following is a true copy:

WAR DEPARTMENT.

Revolutionary Claim.

I certify that in conformity with the law of the United States of the eighteenth day of March, 1818, Archibald Gordon, late a private in the army of the Revolution, is inscribed on the pension list roll of the Maryland agency at the rate of eight dollars per month, to commence on the ninth day of April, 1818.

Given at the War Office of the United States, this 26th day of October, 1818.

(Signed) J. C. CALHOUN,
Secretary of War.

That he is entitled to a pension of eight dollars per month on account of wounds and disabilities received, or of services rendered to the United States during the Revolutionary war; that he served in Captain Michael Rudolph's company, Lee's legion; that he
107 now resides in Cecil county, and he resided there for the space of thirty-five years past, and that previous thereto he resided in Pennsylvania.

his
ARCHIBALD x GORDON.
mark

Sworn and subscribed, this 4th day of September, 1829.
JAMES PURNELL.

Know all men by these presents, that I, Archibald Gordon, of Cecil county, Maryland, a Revolutionary pensioner of the United States, do hereby constitute and appoint John Sharpley, of Baltimore, my true and lawful attorney, for me and in my name, to receive from the agent of the United States for paying pensions in Baltimore, State of Maryland, my pension from the fourth day of March, 1829, to the fourth day of September, 1829, with power to the said attorney to substitute an attorney or attorneys under him for all or any of the purposes aforesaid, and to do all lawful acts for effecting the premises, hereby ratifying and confirming whatever the said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

Witness my hand and seal, the fourth day of September, 1829.

his
ARCHIBALD x GORDON. [SEAL.]
mark

Signed, sealed, and delivered in the presence of—
JAMES PURNELL.

STATE OF MARYLAND, } ss:
Cecil County, }

108 Be it known that on the fourth day of September, 1829, before the subscriber, a justice of the peace for Cecil county, personally appeared the above-named Archibald Gordon and acknowledged the foregoing power of attorney to be his act and deed.

In testimony whereof, I have hereunto set my hand and seal the day and year last above mentioned.

JAMES PURNELL. [SEAL.]

Pension Certificate.

N. S. A. I.

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT, *May* 31, 1881.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of a paper on file in this Department.

In witness whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.] WILLIAM WINDOM,
Secretary of the Treasury.

BRANCH BANK OF THE UNITED STATES,
BALTIMORE 10*th March*, 1829.

Received of William Patterson, president, agent for paying pensions, forty-eight dollars —— cents, being for six months' pension, due to Archibald Gordon, from the fourth day of September, 1829, to the fourth day of March, 1829, for which I have signed duplicate receipts.

848. JOHN SHARPLEY.

109 STATE OF MARYLAND, } ss:
Baltimore City, }

Be it known that on the 10th day of March, 1829, before the subscriber, a justice of the peace in and for Balto. county and city, personally appeared John Sharpley, the attorney named in the annexed power of attorney, and made oath that the same was not given to him by reason of any sale, transfer, or mortgage of the pension, or arrears of the pension therein authorized to be received by him.

JOHN SHARPLEY.

Sworn and subscribed the day and year last above-mentioned before me—

W. L. GILL, *J. P.*

STATE OF MARYLAND, } ss:
Cecil County, }

Be it known that before me, Enoch Cloud, a justice of the peace in and for Cecil county, personally appeared Archibald Gordon, and

made oath in due form of law that he is the identical Archibald Gordon named in an original certificate in his possession, of which I certify the following to be a true copy:

WAR DEPARTMENT.

Revolutionary Claim.

I certify that in conformity with the law of the United States of the eighteenth day of March, 1818, Archibald Gordon, late a private in the army of the Revolution, is inscribed on the pension list roll of the Maryland agency at the rate of eight dollars per month, to commence on the 9th day of April, one thousand eight hundred and eighteen.

110 Given at the War Office of the United States, this 26th day of October, one thousand eight hundred and eighteen.

J. C. CALHOUN,
Secretary of War.

That he is entitled to a pension of eight dollars per month on account of wounds and disabilities received or of services rendered to the United States during the Revolutionary war. That he served in Captain Michael Rudulph's company, in Lee's legion; that he now resides in Cecil county, and has resided there for the space of thirty-five years past, and that previous thereto he resided in Pennsylvania.

his
ARCHIBALD x GORDON.
mark.

Sworn and subscribed, this 5th day of March, 1829.

ENOCH CLOUD.

Know all men by these presents, that I, Archibald Gordon, of Cecil county, Maryland, a Revolutionary pensioner of the United States, do hereby constitute and appoint John Sharpley, of Baltimore, my true and lawful attorney, for me and in my name, to receive from the agent of the United States for paying pensions in Baltimore, State of Maryland, my pension from the fourth day of September, 1828, to the fourth day of March, 1829, with power to the said attorney to substitute an attorney or attorneys under him for all or any of the purposes aforesaid, and to do all lawful acts for effecting the premises, hereby ratifying and confirming whatever the said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents.

Witness my hand and seal, this 5th day of March, 1829.

his
ARCHIBALD x. GORDON. [SEAL.]
mark.

111 Signed, sealed, and delivered in the presence of—
ENOCH CLOUD.

STATE OF MARYLAND, }
Cecil County, } *ss:*

Be it known that on the fifth day of March, 1829, before the subscriber, a justice of the peace for Cecil county, personally appeared the above-named Archibald Gordon and acknowledged the foregoing power of attorney to be his act and deed.

In testimony whereof, I have hereunto set my hand and seal, the day and year last above mentioned.

ENOCH CLOUD. [SEAL.]

Endorsed: Filed June 17th, 1881.

And afterwards, to wit, on the 17th day of June, A. D. 1881, being a day of the June term of said court, the following proceedings were had, to wit:

LYDIA M. FUSSELL }
vs. } Equity. No. 144.
E. S. HUGHES *et al.* }

This cause came on for hearing before Mr. Justice Matthews upon the pleadings and evidence, and was argued by counsel, and was thereupon taken under advisement.

And afterwards, to wit, on the first day of October, A. D. 1881, being a day of the June term of said court, the following decree was entered in this cause, to wit:

112 *Decree.*

LYDIA M. FUSSELL *vs.* E. S. HUGHES *et al.*

This day came the parties, and thereupon this cause came on to be heard on the bill, answers, replies, pleadings, and evidence, and was argued by counsel.

On consideration whereof, and the court, being fully advised in the premises, finds the equity of the case with the defendants.

It is therefore considered that the plaintiff's bill be dismissed; that the defendants go hence without day, and that the complainant, within ten days, pay the costs of this suit, in default of which execution issue against her therefor.

From which decree the complainant prays an appeal to the next term of the Supreme Court of the United States; and the court, finding the value of the real estate in controversy greater than the sum of $2,000.00, exclusive of the costs, do allow said appeal, and fix the bond to be executed by the appellant at the sum of $500.00.

113 *Appeal Bond.*

Know all men by these presents, that we, Lydia M. Fussell, as principal, and Samuel H. Ruggles and A. C. Wilkes, as sureties, are held and firmly bound unto E. S. Hughes, Mary C. Hughes, W. P. Hughes, Maria Hughes, Esther Dennison, and Eleazer P. Kendrick in the sum of five hundred dollars; to the payment whereof, well

and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this first day of October, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above bounden Lydia M. Fussell has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the first day of October, A. D. 1881, in a cause wherein the said Lydia M. Fussell was plaintiff and the said E. S. Hughes *et al.* respondents:

No-, therefore, the condition of this obligation is such, that if the above-named appellant, Lydia M. Fussell, shall prosecute her said appeal with effect and pay all such damages, costs, and expenses as shall be awarded against her as such appellant therein, then this obligation to be void; otherwise, to remain in full force and effect.

114

LYDIA M. FUSSELL. [SEAL.]
SAM'L H. RUGGLES. [SEAL.]
A. C. WILKES. [SEAL.]

Sealed and delivered in presence of—
FELIX R. SULLIVAN.
EDWARD J. CLARK.
JEREMIAH HALL.
J. R. OSBORN, as to Wilkes.

Approved and filed October 15th, 1881.

M. WELKER, *Judge.*

115

Certificate.

UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

I, Augustus J. Ricks, clerk of the circuit court of the United States for said division and district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Lydia M. Fussell is the complainant and Evan S. Hughes, Mary C. Hughes, William P. Hughes, Maria Hughes, Est-er Dennison, and Eleazer P. Kendrick are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Toledo, in said district, this 26th day of October, A. D. 1881, and in the 106th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 148. Lydia M. Fussell, appellant, *vs.* E. S. Hughes *et al.* Filed 4th November, 1881.

113-550-565

Supreme Court of the United States.

OCTOBER TERM, 1884.

LYDIA M. FUSSELL, Plaintiff,
vs.
DANIEL GREGG *et al.*, Defendants. } No. 147.

LYDIA M. FUSSELL, Plaintiff,
vs.
E. S. HUGHES *et al.*, Defendants. } No. 148.

BRIEF, Etc., FOR COMPLAINANT.

JEREMIAH HALL,
Solicitor for Complainant.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1884.

LYDIA M. FUSSELL, Plaintiff,
vs.
DANIEL GREGG *et al.*, Defendants. } No. 147.

LYDIA M. FUSSELL, Plaintiff,
vs.
E. S. HUGHES *et al.*, Defendants. } No. 148.

BRIEF, &c., FOR COMPLAINANT.

These bills and actions come into this Court by way of appeal from the decisions of the circuit court of the United States of America for the western division of the northern district of Ohio, finding the equity of the case with the respondents, and dismissing said bills.

Statement of the Case.

The original and supplementary bills were filed in said circuit court by said plaintiff, the complainant, the equitable owner in fee of said entry and Survey No. 12017 of the Virginia Military District of Ohio, the senior location of a tract of land of 200 acres in satisfaction of military warrant No. 6508, issued to Archibald Gordon by the register of the land office of the State of Virginia, for 200 acres of land due unto him in consideration of his services as a private during the war in the Virginia Line on Continental establishment, against said Daniel Gregg, Eleazer P. Kendrick. And the respondents respectively, in possession of junior entries and surveys No. 14530 and 16070 of the same land, claiming title under said junior location and patents founded

thereon in violation of the proviso of the second section of the act of Congress, entitled "An act extending the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," withholding from location "lands for which patents had previously been issued, or which had been previously surveyed," and declaring that "any patent which" might, "nevertheless, be obtained for land located contrary to the provision of this act," should "be considered null and void. (United States Land Laws, vol. 1, page 63, No. 98, edition 1880.)

The plaintiff deraigned her title to said senior location of land, how descended to her, and averred that her said entry and survey were so made and recorded in conformity to law, were precise and certain, and appropriated the land on which they were made, and vested in her said ancestor, Archibald Gordon, a good equitable estate in fee, and so clearly stated the making of said junior locations as to leave no question of their covering the same land previously appropriated by Gordon's entry and survey, and that the said junior locations, and the patents founded thereon were all of them void, and none of them ever appropriated any land or vested in said Wallace or Gregg any title to said land.

The plaintiff then complains that the papers in her said location, at a time unknown to her, some person, also to her unknown, abstracted from the office of the principal surveyor of said military district and has destroyed them or suppressed them, and still doth, or that they have been lost in said office without her fault; and that said Eleazer P. Kendrick, principal surveyor of said military district, in possession of the records of the locations of lands therein, at a time unknown to her, without authority, on the pretense that her location had been made on a State lane warrant, wrongfully wrote on the margin of the record of her entry, No. 12017, the word "withdrawn," and across and upon the plat and record of the survey thereof the words "State line;" that the writing of said words bear no date, but were so written subsequent to the making of said junior locations, and that

said Kendrick still being such surveyor now refuses to give to her a duplicate of her survey No. 12017, and certificate necessary to enable her to return it to the General Land Office for patent, all of which acts of said Wallace, Gregg, Kendrick, and the defendants in possession of said several junior locations, claiming title under them and the patents founded thereon, the receipts of the rents and profits thereof, and refusal to account to her, are contrary to equity. Wherefore the plaintiff prays that her location, entry, and survey 12017, founded on said military warrant 6508, be established and affirmed and the validity thereof forever perpetuated; that said junior location and patents be adjudged to have been made and issued in violation of the proviso of said act of Congress, and void; that the said words "withdrawn" and "State line" so written upon said records of location, entry, and survey No. 12017 be adjudged to have been so written without authority, and that the evidence of the validity of the said military warrant be also perpetuated; that complainant have an order for the delivery of the possession of said premises to her, and that an account may be taken of the rents and profits of said premises during the time they have been occupied by the said defendants to the exclusion of the complainant, and that such other relief may be granted to the complainant as in equity she may be entitled to, praying process, &c.

To the cases thus stated in the bills, the defendants answer, denying genealogy of the plaintiff, her deraignment of title, her marriage, the death of her husband; that her grandfather and father died intestate, seized of an equitable estate in said land, or that she had such estate therein, or that the said entry and survey, No. 12017, were valid and subsisting at the date of the making of said junior entries and surveys; and also denying the allegations of paragraphs Nos. 6, 14, 15, 16, and 17 of said bills, except the averment of the making of said junior entries, surveys, patents, and their possession thereof, claiming title thereunder.

II. Interpose statute of limitations.

III. State that the elder Gordon in his lifetime did "sell, assign, transfer, and deliver the entry and survey No. 12017, by written assignment, to the junior Gordon, who afterward, by his deed, duly executed, prior to his death, sold and conveyed the same and the land covered thereby to one Francis E. Hart."

IV. State that the senior Gordon died prior to the death of the junior Gordon, and that the junior afterwards, by his deed, executed, sold, and conveyed the said entry and survey No. 12017, and the land covered thereby, to one Francis E. Hart, and did not own the same or any interest therein at his death.

V. These respondents say that the said junior Gordon, in his lifetime, by his deed executed, sold, and conveyed the said entry and survey and the land covered thereby to one Francis E. Hart, and the plaintiff is estopped by the said deed from denying the validity of said conveyance, or asserting any title or interest in the said land against the same.

To these defences the plaintiff replies:

I. That she denies each and every allegation of fact stated in the said several answers and defences.

II. That the legal title to the premises in her said bill described as between herself and said defendants is in the United States.

III. That the complainant had no knowledge of the fraud of said Wallace and Gregg in making their several junior locations on the same land previously entered and surveyed for her said ancestor, nor of the issuing of their respective patents founded thereon, until within six years next before the filing of her said bills &c.

IV That at the time said survey 16070 was made and said patent was issued thereon, she was then a married woman, the wife of Joseph B. Fussell, and so continued to be until his death, December 6th, 1865.

V. She denies her said cause of action is stale, and avers that her said cause of action did accrue to her within twenty-one years next before the filing of her said bills and the commencement of her said actions herein, &c.

That as to the third defence stated in said answers she denies each and every allegation thereof, and avers that if her father, the junior Gordon, ever made a deed of said entry and survey No. 12017 to Francis E. Hart or any other person, it was without consideration, and made at a time when her said father had no title to said entry and survey, or was seized thereof; was without covenants of warranty or other covenants of assurance of title, and made previous to the death of her grandfather, said Archibald Gordon, Senior, who died seized of said entry and survey: that no possession was ever taken of said entry and survey under said pretended deed by said Fancis E. Hart or any other person.

That as to the fourth defence stated in said answer she denies the execution of the deed alleged in said defence, and avers that said Archibald Gordon, Junior, her father, died seized of said entry and survey and the land covered thereby.

That as to the fifth defence stated in said answer she denies each and every allegation therein stated, and avers that if her father, said Archibald Gordon, Junior, ever made a deed of said entry and survey for the land covered thereby to Francis E. Hart or any other person it was made before the death of her grandfather, said Archibald Gordon, Senior, who died seized of said entry and survey and the land covered thereby; that said deed, if made, was without consideration and without covenants of warranty or other assurances of title; that said Francis E. Hart or any other person never took or received possession of said entry and

survey under said pretended deed, &c., and she denies that she is estopped to assert title to said entry and survey by reason of said pretended deed, &c.

Summary of the Plaintiff's Evidence.

To maintain the issues thus presented the complainant produced and relied upon the following evidence:

1st. Upon the deposition of Eleazer P. Kendrick, one of the defendants (who failed to answer the bills or either of them, but to do so made default).

The testimony of this defendant taken on the 10th day of February, 1881, proves him to have been 90 years of age on his last birthday; to have been appointed the principal surveyor of the Virginia military district in Ohio about the year 1845, and residing at Chillicothe, where he kept his office as such surveyor; that he had had the possession of all the records of locations of lands in said district since the date of his appointment, and during that period had been entitled to all the papers pertaining to said office.

That said entry No. 12017, in the name of Archibald Gordon, for 200 acres of land in said district, founded on military warrant No. 6508, was recorded in said office January 1st, 1823, the survey thereof made March 29th, and recorded therein November 6th, 1824.

That the word "withdrawn" had been written on the margin of the entry of said Gordon upon the record of entries in said office; the same word had been written upon and across the plat of the record of the survey thereof in said office. The words "State line" had also been written across and upon said plat, &c., of the location of said Gordon.

That the words so written upon said margin and said several records of the location of said Gordon indicated that said location had been withdrawn or abandoned, and also that the location had been made upon a military warrant issued for services in the State line; the word withdrawn

was so written with ink, and the words State line were so written with a lead pencil.

The party and witness says he is not confident that he wrote the word "withdrawn" on the record of the location, but if he did it would appear to have been so written in his handwriting; and if he did write said word "withdrawn" upon said record, it was from information derived from an abstract of military warrants he found in the office in the handwriting of Latham, his predecessor in office; that said military warrant No. 6508, upon which Gordon's location was founded, was a "State line warrant."

This party and witness can't say that said Gordon, or any one claiming his location, had any knowledge of the writing of said words "withdrawn" and "State line."

The party and witness states that the entry No. 16070, for 130 acres, was made October 4th, 1851, and 100 acres of the entry surveyed on the 20th day of December, and recorded 2d day of November, 1855, and covers the same land, calling for the same corners as the survey above referred to in the name of said Gordon, and appropriated by said Gordon's location.

The party and witness states that he never saw military warrant No. 6508, on which Gordon's location was founded, or the original survey of said location No. 12017.

That he was not at any time retained by Gordon or any one claiming to own his location.

That his predecessor, Allen Latnam, retained those surveys which had been recorded when he left the office, in which he had a lien for office fees.

That he don't know that the withdrawal is in his handwriting, and that he has not the record present to determine, nor does he remember of Latham, or any other person requesting him to make such withdrawal.

That when the papers in a case were delivered to the locator, his agent or attorney, or other person, a note was made on the record to whom the papers were delivered, and the date thereof, but in the cases of the papers retained by

Latham no note whatever was made upon the record, and in the case of Gordon's location no note was made on the record except "State line."

That the papers retained by Latham were kept by him in an office in Chillicothe, after he resigned his office of surveyor. Daniel Gregg became his clerk in process of time, and after Mr. Latham removed from Chillicothe, more than 20 years ago, the office of Mr. Latham's business was left in Mr. Gregg's possession, and still is in his custody, as the executor of Mr. Latham, who has been dead several years.

2nd. The deposition of J. J. Hannah, chief clerk of the land department, in the office of the auditor of State, Columbus, Ohio, and his evidence taken May 16th, 1881, who states that there is in said office and department a record and abstract of withdrawals of land in the Virginia military district of Ohio, prefaced as follows, to wit:

"SURVEYOR'S OFFICE, VIRGINIA MILITARY DISTRICT,
"CHILLICOTHE, *Dec.* 16, 1850.

"The following is an abstract of all the withdrawals of entries and parts of entries made in this office up to this date.

"E. P. KENDRICK,
"*Principal Surveyor.*"

And including entry number 15963.

Said abstract does not contain the withdrawal of entry number 12017.

There is a record in this office of entries of land in said district, entry 12017, as shown by our record, was first made November 11, 1822, and withdrawn. Entry 12017 again appears by our record to have been made January 1st, 1823. This last entry is not shown to ever have been withdrawn, and so far as our record shows, the same is in full force. We have a record of surveys, and said survey is recorded and dated March 25, 1823, and recorded November 5, 1824. No withdrawal on any pretense whatever. We have a record of entry No. 16070, for 30 acres, in the name of Daniel Gregg, referring to surveys Nos. 9993, 9977, 9994, and No.

9978, of October 4, 1851, and certified by said Kendrick March 5, 1852.

And to the question, "State whether or not you have in your records an entry in the name of said Gregg of the number, to wit, 16070, for 130 acres, or any other quantity of land, except as in the before-named entry, 16070, for 30 acres," the witness answered, "We have not."

3d.-The deposition of Jeremiah Hall, who states he is familiar with the records of locations of land in the Virginia military district of Ohio; that as attorney of complainant in these actions he examined the records of entry and survey No. 12017, founded on military warrant No. 6508, and found the entry recorded January 1st, 1823; surveyed March 25th, and recorded in the handwriting of Richard C. Anderson (the first principal surveyor of the Virginia military district in Ohio); that the words "withdrawn" and "State line," written upon the record of said location, were in the handwriting of E. P. Kendrick, and when he inquired of him by what authority he had written said words upon the name of the location, Kendrick stated he supposed the location of Gordon had been made upon a "State-line" warrant, and upon that authority had written said words upon the record, but at the time he had no knowledge of Gordon or of any one claiming under him; had never seen the said military warrant nor original survey in said location, but suggested that they might be found in the possession of said Daniel Gregg, and advised me to see him, which I did, and also wrote to him on the subject. He did not, however, answer my letter, and when I went to see him he denied all knowledge of the papers.

I then inquired of Mr. Kendrick whether he could not give me a copy of the survey without the words "withdrawn" and "State line," and a certificate of the validity of the location, so I might procure the location to be carried into patent on a duplicate warrant. He said he could not,

and requested me to again go and see Mr. Gregg, which I declined to do.

The witness states he has been several times on the ground covered by said location, and here presents two plats, marked A and B, and makes them a part of his testimony, in illustration that the junior locations of Wallace, No. 14530, for 50 acres, and Gregg, No. 16070, for 100 acres, cover the same ground before located by Archibald Gordon, in his entry and survey No. 12017, for 200 acres, in satisfaction of his military warrant No. 6508, issued to him July 19th, 1822, by the register of the land office of the State of Virginia for 200 acres of land due unto him in consideration of his services as a private during the war in the Virginia Line on Continental establishment. These Exhibits A and B are in the witness' own handwriting and signed by him.

4th. Duplicate of said land warrant No. 6508, Exhibit "D" of the deposition of the complainant.

5th. Depositions of Ann E. Porter, Rachel Ann Porter, and Lydia M. Fussell, complainant, taken on the 5th day of March, 1881, proving the genealogy of descent, heirship, marriage of her father, her sister, herself, the death of her father, her sister, her sister's husband, her children, leaving complainant sole heir-at-law, and the death of her own husband, with Exhibits "A," "B," "C," and "D."

6th. Deposition of Alexander Gordon, taken March 8th, 1881 (and agreed that it be read on the hearing of the several bills), proving identity of Archibald Gordon, of Baltimore, as son and only child of Archibald Gordon, deceased, late a Revolutionary soldier and pensioner of the United States, resident of the county of Cecil and State of Maryland, who died there about 1829.

7th. Depositions of William Callahan and William E. Pendry, taken June 1st, 1881, to prove that survey No. 12017, or the Gordon location, had been occupied by squat-

ters, and their knowledge of that fact, and the notoriety of the location as Gordon's in the neighborhood for 35 years.

8th. Application for pension and to establish that the locator of this land resided in Cecil county, Maryland, and could not write his name, but always made his mark.

9th. Pension certificate (filed June 12th, 1880, but printed in record of action, 148), to prove the pensioner resided in said county for 35 years prior to 4th of March, 1829, and that he could not write, and that he was alive at that date, and that he was still alive on the 4th day of September, and could not write.

10th. Power of attorney (printed record, page 71, but omitted from index) of Archibald Gordon, of Cecil county, Maryland, to Robert McKim, of the city of Richmond, to apply for said bounty land warrant, and receipt for the same, dated July 25th, 1821, signed by his mark, to prove he at no time wrote his name, nor executed any paper by any other mode than making his mark, and to prove the allowance and issue of said warrant on account of services in the Continental Line of Virginia.

11th. The surveys and plats of location No. 13593 for 150 acres of land; No. 14530 for 50, acres, both in the name of said Cadwallader Wallace, and the survey No. 16070 for 100 acres, in the name of said Daniel Gregg, are put in evidence by the plaintiff to prove that they cover the same ground and land previously entered and surveyed in the name of her ancestor, said Archibald Gordon, in his location No. 12017 for 200 acres of land, in satisfaction of his said military warrant No. 6508.

12th. And to further prove the same fact the plaintiff puts in evidence the transcript of the action of said Gregg *vs.* Jesse Domand, in the court of common pleas of Logan county, Ohio, found on pages 60–71 of the printed record in

action No. 147 (also omitted from the indexes), in which Gregg admits his location covers the same ground surveyed for Gordon, and also omits to answer the interrogatories put to him in said action, and to prove the disposition of the case was at a period subsequent to 20 years, and that Downard's defense was given away by his lawyer for the deed of Gregg to William H. West for five-eighths of survey 16070, for the nominal consideration of one dollar.

Summary of the Evidence of the Defence.

The statement of the counsel for the complainant of the evidence introduced by the defendants to maintain the issue on their part:

1st. The defendants offered no evidence upon the issue tendered by their denial.

2d. To maintain the issue of the statute of limitations they offered several deeds and a large amount of parol evidence of the occupancy of the land of a recent date.

3d. To disprove the complainant's title the defendants produced in evidence a copy, certified by the recorder of Logan county, in which these lands are situate, of a deed executed and dated June 27th, 1827, between Archibald Gordon, therein described as late of Cecil county, Maryland, and Stephen F. Hart, of the county of Baltimore, whereby, in consideration of $100, paid by Joseph Hart, Archibald Gordon grants, bargains, and sells to Stephen F. Hart, in fee simple, all his lands in Ohio, Indiana, and Illinois, describing amongst others one tract in Ohio, surveyed on military warrant No. 6508, and on entry No. 12017, and setting out an accurate copy of the description contained in the survey. This deed purports to have been signed, sealed, and delivered in the presence of John Aisqueth and John F. Denver by the grantor, and acknowledged by him before John Aisqueth and John F. Harris, two justices of the peace of the State of Maryland for the city of Baltimore, on the 27th

day of June, 1827, and whose names are signed to said acknowledgment, and who were certified by the clerk of the superior court of Baltimore city the 23d day of August, 1862, to have been justices of the peace of the State of Maryland in and for the city of Baltimore at the time of said acknowledgment, duly commissioned and sworn, which deed was received and recorded Dec. 27th, 1862, all of which evidence and the arguments of counsel were submitted to said circuit court. On consideration said court found the equity of the case to be with the defendants, and dismissed the complainant's bills with judgment against her for costs, and thereupon delivered an opinion of their findings of the facts and of the law of the case, and in which the complainant avers the said court erred as follows, to wit:

I. The court erred in presuming, contrary to the issue, the evidence, the circumstances, and the law of the case, that the said deed purporting to have been the deed of Archibald Gordon, late of Cecil county and State of Maryland, bearing date at the city of Baltimore June 27th, 1827, for the sale of said survey of land No. 12017, and the land covered thereby, in fee, to said Stephen F. Hart, in favor of the defendants and those in the possession of the land, strangers to said deed, and claiming title under said junior locations Nos. 14530 and 16070 of the same land, and the patents of said Wallace and Gregg, founded on said respective junior locations and surveys, to be the deed of said Archibald Gordon, Senior.

II. The court erred in finding that on the supposition the said deed was the deed of the son, and made in the lifetime of the father, the same presumption would justify a finding in its support of a previous conveyance from the father to the son; and that the recital in it that the lands conveyed were his lands, even in the absence of a covenant of general warranty, would be sufficient to prevent, by estoppel, the complainant as the grantor's heir-at-law deriving title through him, from claiming an estate as against

the defendants, and those in the possession of the land strangers to said deed, and claiming title under said junior location of the same land, and the patents of said Wallace and Gregg, founded on said junior location, in derogation of said deed.

III. The court erred in finding that by the language used in the act of Congress of July 7th, 1838, confirming entries and surveys made in the interim between June 1st, 1832, and the passage of that act as valid, notwithstanding any omission theretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding, applied to entries and surveys previously made during the period of former acts of extension, without which provision such entries and surveys, made under former acts, the court found would have been void.

IV. The court erred in finding that the said act of March 3d, 1855, which extended the time for making and returning surveys of entries made prior to January 1st, 1852, to two years from and after the passage of that act, did not, like the previous acts of extension, revive the right to return to the General Land Office surveys made and recorded in the office of the principal surveyor of said district.

V. The court erred in finding that the said of act of May 27th, 1880, to construe and define an act to cede to the State of Ohio the unsold land in the Virginia military district in said State, approved February 18th, 1871, and for other purposes, did not revive the survey of her ancestor, and her right to return it to the General Land Office for patent, notwithstanding the withdrawal entered upon the record of her said survey by said Eleazer P. Kendrick, principal surveyor of said district, without authority and upon the pretext that said location and survey had been made upon a State line warrant, and his refusal to deliver her a copy or a duplicate of her said survey and certificate to return to the General Land Office for patent.

VI. The court erred in construing the words "land office," in the second section of said act of May 27th, 1880, to mean the "General Land Office."

VII. The court erred in construing the last clause of the third section of said act of May 27th, 1880, not to apply to surveys made previous to January 1st, 1852, or to revive the right to return such surveys to the General Land Office for patent.

VIII. The court erred in finding, contrary to the evidence and the law of the case, that the defendants in possession were innocent purchasers of the title of Wallace and Gregg, and entitled to be protected.

IX. The court erred in finding that the said act of February 18th, 1871, withholding from said act ceding to the State of Ohio the land remaining unsurveyed and unsold in the Virginia military district of that State, as construed and defined by the first section of said act of May 27th, 1880, did not restore her equitable title to said survey in the name of her said ancestor notwithstanding anything in the third section of the said act of March 23d, 1804, to the contrary.

X. The court erred in finding that the second section of the said act of May 27th, 1880, did not validate all legal surveys returned to the land office of the Virginia military district in Ohio for record on or before March 3d, 1857, on entries made on or before January 1st, 1852, and founded on unsatisfied Virginia military Continental warrants.

XI. The court erred in annulling and setting at naught the acts of March 3d, 1855; February 18th, 1871, and May 27th, 1880, in respect to the revival of the equitable estate in all legal surveys made on or before January 1st, 1852, and returned to the land office of the Virginia military district on or before March 3d, 1857, on entries made on or before January 1st, 1852, founded on unsatisfied Virginia military Continental warrants.

XII. The court erred in holding that the complainant's only remedy in this case was to cloth her equity with the legal title by an application under the law to the public officer of the United States charged with the duty of issuing patents to those entitled and then proceed at law to recover possession.

XIII. The court erred in holding that they had no jurisdiction over the acts of the principal surveyor of said military district to cancel or decree void his unauthorized act in writing said "withdrawal" upon the record of said entry and survey No. 12017 on the pretense that said location was made on a State line.

XIV. The court erred in holding, contrary to the evidence and the law of the case, that the complainant's right of action is barred.

XV. The court erred in holding, contrary to the law of this case, that time runs against the beneficiary in favor of a stranger to bar her action when it did not run against the trustee.

XVI. The court erred in holding, contrary to the law of the case, that the complainant's ancestor's location and survey No. 12017 was released from the claim for bounty land, in satisfaction of which it was made, anything in the acts of December 19th, 1854; March 3d, 1855; February 18, 1871, and May 27th, 1880, to the contrary notwithstanding.

XVII. The court erred in finding the equity of the cases with the defendants contrary to the evidence and law of the cases, and in dismissing the bills at the cost of the complainant.

The Issues of Fact.

The facts of these cases, as established by the evidence, lie within a narrow compass, and may be briefly stated as follows:

1st. On the 19th day of July, 1822, the register of the land office of the State of Virginia issued to Archibald Gordon, of the county of Cecil and State of Maryland, a military warrant, No. 6508, for 200 acres of land, due him in consideration of his services as a private in the Continental Line for the war, agreeably to a certificate from the Governor and council, which was received in the land office.

2d. Gordon, in satisfaction of this military warrant, on the 1st day of January, 1823, recorded or procured to be recorded in the office of the principal surveyor of the Virginia military district in Ohio an entry, No. 12017, for 200 acres, the land in controversy, and on the 25th day of March caused his said entry to be surveyed, and to be recorded in said office on the 5th day of November, 1824.

3d. On the 30th day of October Wallace, himself a deputy surveyor of said district, made a survey, No. 13593, for 150 acres of land, in his own name, adjoining Gordon's survey on the west side, and in surveying his south line, beginning at a stake in the line of David Aikin's survey, No. 10387, 10388, thence with said line N. 78 E. 100 poles to a stake in the line of Archibald Gordon's survey No. 12017; thence with the said line N. 12 W. 240 poles to a hickory and elm, northwest corner to Gordon's said survey.

4th. On the 25th day of May, 1840, said Wallace recorded an entry, No. 14530, in his own name, in said office, for 50 acres of land, to begin at the northwest corner of survey No. 12017; thence to the southwest corner thereof; thence and from the beginning equal distance S. 78 W. for quantity, and on the same day surveyed his said entry, beginning at a beech and large red oak in the line of Archibald Gordon's

survey, No. 12017; thence with his line S. 12 E. 174 poles to two ashes, southwest corner to said survey; thence with the line of David Aikin's survey, No. 10387, 10388, S. 78 W. 24 poles to three ironwoods, a white walnut, and hickory, corner to said survey; thence with another line thereof N. 12 W. 60 poles to two beeches and an ash, corner to said survey; thence with another line thereof S. 78 W. 5 poles to the southeast corner of said Wallace survey, No. 13593 of 150 acres; thence with the line of said survey N. 12 W. 228 poles to the northeast corner thereof; thence N. 78 E. 39 poles to a stake in a pond northwest corner to Gordon's said survey; thence with the line thereof S. 12° E. 114 poles to the beginning; and on the next day procured his survey to be recorded in said office.

5th. It will be observed from this survey that Wallace made for Gordon's survey, No. 12017, a new west line to begin at a stake in a pond N. 78 E. 29 poles from the hickory and elm called for by Wallace in surveying his east line as Gordon's northwest corner; thence S. 12 E. to two ashes in the line of David Aikin's surveys Nos. 10387, 10388, and called these points Gordon's northwest and southwest corners. If this is the line called for by him in his entry, then his entry was made on the land appropriated by Gordon's entry and survey, as well as his survey which he procured to be patented to himself on the 8th day of April, 1842.

6th. This new west line made by Wallace for Gordon's survey to accommodate his entry and survey No. 14530 so as to cover a part of Gordon's land also served Gregg, and enabled him to cover the residue of Gordon's land without referring to it at all, by the survey of 100 acres of his entry No. 16070, beginning at the large red oak and beach corner to Wallace's survey No. 14530; thence with the line thereof S. 12 E. 113 poles to an ash and beech, corner to said survey, in the line of survey No. 10387, 10388; thence with the line thereof N. 78 E. 83 poles to two beeches, easterly corner to

said survey, in the line of Alexander Parker's survey No. 9958; thence with the line thereof N. 12° W. 193⅗ poles to a stake, northwest corner to said survey, in the line of survey No. 10239; thence with the line thereof S. 78° W. 83 poles to a stake in a pond, northeast corner to said survey No. 14530; thence S. 12° E. 80⅖ poles to the beginning; which survey he procured to be recorded in said office, and on the 20th day of November procured his said survey to be patented to himself.

7th. Eleazer P. Kendrick then, at the solicitation of Wallace and Gregg, or of his own motion, it is immaterial which, on the pretext that Gordon's location was made on a military warrant issued for services in the State line, without having ever seen the warrant, as he himself states, and certainly without the knowledge of Gordon, who died in 1829, or any one claiming his title, as he also states, wrote in the margin of the entry of Gordon's location upon the records in his office the word "withdrawn," and upon and across the plat upon the record of the survey in his office the word "withdrawn," and also the words "State line," and among them they spirited away the original warrant and office papers in the location, or suppressed them, to enable them to appropriate, as they intended, Gordon's land to their own use.

Jurisdiction and Doctrine of Innocent Purchasers.

The bills present a proper case for the interference of a court of equity (Galt *vs.* Galloway; United States *vs.* Stone), and also a case in which the doctrine of innocent purchasers does not apply, because the defendants in possession claim title by purchase under Wallace and Gregg, independent locations of the land (void in their inception) previously located by Gordon, under whom and whose location the plaintiff claims her title.

It is only necessary to state this proposition to refute and disprove this claim of innocent purchasers in this case.

The doctrine only applies when all the parties claim title under same original source of title.

In this case the defendants do not claim title under Gordon, nor under his location.

To prove the plaintiff had no title in this case, it was, perhaps, competent for the defendant to prove her ancestors had sold their title and did not die, seized of an estate in the land.

There is no pretense of any evidence tending to prove the elder Gordon, and locator who died after the 11th day of September, 1829, ever disposed of his estate in this land.

If the deed shown in evidence executed to Stephen F. Hart, June 27th, 1827, was the deed of his son, who went down to Baltimore from Cecil county, Maryland, and married the daughter of Joseph Hart and made this deed, it was made before the death of his father, and at a time when he had no title or estate in this land.

This deed might estop the grantor, his heirs, or even a stranger in possession of the land in an action by the grantor or one claiming under the deed to prove that fact, but the contrary was held by the supreme court of Ohio in the case of Hart's heirs against the defendants, founded on this very deed, and that is an end of the estoppel. (32 O. S.)

It is not the office of estoppel to pass title, but to exclude the evidence to disprove the title or facts upon which the title rests or is supposed to rest.

The defendants in this case are strangers to this deed, and cannot interpose the estoppel even if the decision of the supreme court of Ohio was wrong.

Estoppels nor presumptions do not obtain in favor of strangers in possession of land claiming under adverse titles to the deed upon which the estoppel or presumption is raised.

But it is not the deed of the son, nor was he or his father ever in the possession of the office papers of the location, as shown by the record, and the grantor in this deed obtained his description in some other way.

Had the father had the office papers and given the location to his son, he would have assigned the location in writing on the back of the survey or on separate paper, but in either event he would have delivered the office papers if in his possession, but he did neither, nor did he give or sell to the son by parol, for in that event he would have delivered the papers, without which the gift or sale would have been void *ab initio*.

Hart's heirs did not have the office papers; had they had, they would have relied upon them; nor did they have the said deed, but at the hearing of their bill against Gregg *et al.* relied upon a copy from the record in Logan county and surprised their counsel when their evidence was taken tending to prove that the deed, if not a forgery, was the deed of the son, who had gone down to Baltimore and married Joseph Hart's daughter, and that he was not the Revolutionary soldier, &c.

Coming, then, to the question made by the circuit court in the delivery of their opinions in this case that, waiving all other objections to the plaintiff's title, her ancestor's location had been forfeited to the Government of the United States under the 3d section of the act of Congress of the 23d day of March, 1804, entitled "An act to ascertain the boundary of the lands reserved by the State of Virginia northwest of the river Ohio, for the satisfaction of her officers and soldiers on Continental establishment, and to limit the period for locating the said lands." United States Land Laws, Local and Temporary, vol. 1, page 32, act No. 35.

The 1st, of a series of acts adopted from Virginia, and constituting the system of land titles peculiar to the Virginia military district in Ohio.

The 2d section of said act provided that all the officers and soldiers, or their legal representatives, who are entitled to bounty lands within the above-mentioned reserved territory, shall complete their locations within three years after the passing of this act, and any such officer and soldier, or his legal representative, whose bounty land has or shall

have been located within that part of the said territory to which the Indian title has been extinguished shall make return of his or their surveys to the Secretary of the Department of War within five years after the passing of this act, and shall also exhibit and file with the said Secretary and within the same time the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept, which warrant, or certified copy thereof, shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land; and every person entitled to said land and thus applying shall thereupon be entitled to receive a patent in the manner prescribed by law.

The 3d section of said act provided "That such part of the above-mentioned reserved territory as shall not have been located and those tracts of land within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the Secretary of War within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty land, and shall be disposed of in conformity with the provisions of the act, entitled 'An act in addition to and modification of the propositions contained in the act entitled an act to enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes.'"

It will be observed that the provisions of the act reaches back to all locations made under the act of August 10th, 1790, and the acts amendatory of the said act, or any other act, "to enable said officers and soldiers, or their legal representatives, to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Sciota."

On the 2d day of March, 1807 (said land law, &c., page

39, act No. 45, Sec. 1), Congress passed an act to extend the time for locating land in said district for the further period of 3 years from the 23d day of March next, and to return surveys to 5 years from said last-named day.

Providing however "That no locations, as aforesaid within the above-mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered as null and void."

March 16th, 1810 (said laws, page 43, act No. 51), Congress passed another act extending the time to 5 years to obtain warrants and locate, and to 7 years to return surveys, &c., with the proviso prohibiting the location of land previously patented or surveyed, &c.

November 3d, 1814 (said laws, page 48, act No. 64), Congress passed another act extending the period to 3 years to obtain warrants and locate, and to 5 years to return surveys, &c., to Gen'l Land Office, with proviso prohibiting the location of land previously patented and surveyed, &c.

April 11th, 1818 (said laws, page 56, act No. 82), Congress passed another act extending the period to 2 years to obtain warrants and locate, and to 3 years to return surveys, &c., with proviso prohibiting the location of land previously patented or surveyed, &c.

February 9th, 1821 (said laws, page 61, act No. 93), Congress passed another act extending the period to obtain warrants and locate to 2 years from the 4th day of January, 1821, and to return surveys, &c., and to 4 years from last-named day to return surveys, &c., with proviso prohibiting the location of land previously patented or surveyed, &c.

March 1st, 1823 (said laws, page 63, act No. 98), Congress passed another act extending the period to 2 years from 4th day of January, 1823, to obtain warrants and locate, and to return surveys, &c., to 4 years from last-named day to return

surveys, &c., with proviso prohibiting locations on lands previously patented or surveyed, &c.

May 20th, 1826 (said laws, page 68, act No. 112), Congress passed another act extending the period to the 1st day of June, 1829, to obtain warrant, and to the 1st day of June, 1832, to locate, and to the 1st day of June, 1833, to return surveys, &c., with proviso forbidding location on land previously patented or surveyed, &c.

February 24th, 1829 (said laws, page 71, act No. 119), Congress passed an act authorizing the appointment of a surveyor for the Virginia military district within the State of Ohio.

July 7th, 1838 (said laws, page 80, act No. 146), Congress passed another act extending the power to the 10th day of August, 1840, to locate and return surveys, &c., with a proviso forbidding locators on lands previously patented or surveyed, &c., and validating all entries and surveys made in satisfaction of legal bounties upon Continental establishment on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, any omission heretofore to extend the term for the making of such entries and surveys to the contrary notwithstanding, with the proviso prohibiting locators on land previously patented or surveyed in satisfaction of warrants granted for the legal bounties of said officers and soldiers.

August 19th, 1841 (said laws, page 82, act No. 154), act of July 7th, 1838, revived to 1st day of January, 1844.

July 29th, 1846 (said laws, page 87, act No. 166), act of August 19, 1841, revived to 1st day of January, 1848.

July 5th, 1848 (said laws, page 88, act No. 172), act of August 19th, 1841, revived to 1st day of January, 1850.

February 20th, 1850 (said laws, page 89, act No. 174), act of July 5th, 1848, revived to January 1st, 1852.

December 19th, 1854 (said laws, page 91, act No. 180), extending the period for two years from the passage of this act to survey entries made prior to the 1st day of January, 1852, and return their surveys, &c.

March 3d, 1855 (said laws, page 91, act No. 183), extending the period for two years from the passage of this act to survey entries made prior to 1st day of January, 1852, and return their surveys, &c.

February 18th, 1871 (said laws, page 94, act No. 187), to cede to the State of Ohio the lands remaining unsurveyed and unsold in the Virginia military district in that State.

May 27th, 1880 (said laws, page 95, act No. 190), "An act to construe and define an act to cede to the State of Ohio the unsold lands in the Virginia military district in said State, approved February 18th, 1871, and for other purposes."

The foregoing acts of Congress constitute the series and form the system of land titles in the Virginia military district of Ohio.

And I agree with the opinion expressed by said circuit court in these bills and actions as to the construction to be given these acts, except as to the construction of the clause validating entries and surveys made during the interim between the expiration of the period limited by the act of May 20th, 1826, to complete locations, and the passage of the said act of July 7th, 1838, containing said clause; that clause is limited to entries and surveys made in the absence of an act of extension, and I do not deem the clause was necessary at all.

2d. Except that part of the opinion in which the court deny to the said acts of December 19th, 1854; March 3d, 1855, and May 27th, 1880, the same construction as the previous acts of extension as to the return of surveys, &c., to the General Land Office made on or before January 1st, 1852; and

3d. Except also the construction of the words "land office" in the second section of said act of May 27th, 1880, to mean the "General Land Office."

When a return to the General Land Office is intended it is so expressed, and the return is made, or to be made, of the

"surveys and warrants, or certified copies of warrants, to the General Land Office," &c. This formula is, without exception, from the day of the passage of the first act, to extend the period to obtain warrants and complete locations, and to return surveys, &c., to wit, November 3d, 1814, after the passage of the act establishing the General Land Office, to wit, April 25th, 1812. (See Public Land Laws, Instructions and Opinions, part I Laws, page 211, chapter 136.)

By these words "land office," in said section 2 of said act of May 27th, 1880, was intended the land office of said Virginia military district designated in the 3d section of said act as the office of the principal surveyor of said district, the office to which all surveys legally made were returned for record. See the case of Galt *vs.* Galloway, 4 Peters, 332, where Justice McLean, delivering the the opinion of the Supreme Court of the United States, on page 342, says of the principal surveyor: "He is the register of the land office and keeps a record of the entries and surveys of land located in said district, and on his official certificate patents are issued."

This series of acts of Congress was passed to enable the officers and soldiers of the Virginia Line on Continental establishment to obtain titles to certain land lying northwest of the river Ohio, between the Little Miami and Sciota. This was the title of the first act, that of August 10th, 1790. The first act of Congress passed upon the subject (said laws, page 1, act No. 1).

All patents issued for lands located upon military warrants, lying northwest of the river Ohio, between the Little Miami and Sciota, recite this act, its title and the amendments thereof.

It will be remembered that Virginia was the owner of vast tracts of waste and unappropriated land derived under the second charter of James I, King of England, of May 23d, 1609, of which the following is an extract (said Public Laws, &c., page 613, No. 1, Appendix, sec. 6): "And we do also, of our special grace, &c., give, &c., unto the said

treasurer and company, &c., all those lands, countries, and territories, situate, lying, and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward 200 miles, and from the said point of Cape Comfort, all along the seacoast to the southward 200 miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea, west and northwest; and, also, all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid."

And thus holding these immense tracts of unappropriated lands very early in the war of the Revolution, adopted the idea suggested by Congress of granting land bounties to her officers and soldiers, both in the State and Continental Line and establishments, and having it more in her power, she was more liberal than Congress in these grants, and accordingly her General Assembly by her acts of October, 1779, 10 vol. Henning's Statutes of Virginia, pages 23, 51, 141, and 160; of May and October, 1780, pages 240, 331, 375, 466; of November, 1781, page 499; of May, 1782, 11 vol., same statutes, page 83; of October, 1783, pages 309, 353. (Land Laws for Ohio, pages 111 to 125, inclusive,) granted to her officers and soldiers bounty lands in the proportion of 2,666⅔ to 15,000 acres to those commissioned according to rank, and to a private and non-commissioned officers 100 to 200 acres for three years' service, and in excess 200 to 400 acres each, and in proportion for all services in excess of six years, and declared their titles to such bounties absolute and unconditional, and in the event of an insufficiency of good lands for the satisfaction thereof on the southeast side of the river Ohio, to be adjudged of by the superintendents in that tract of country lying on the Cumberland and Tennessee rivers as set apart by law for the said officers and soldiers, and then to proceed in like manner to survey on the northwest side of the said river Ohio, between the rivers Sciota and the Little Miami, and the fact of a deficiency of good land on the southeast side of said river having been ascertained

and reported to Congress, all of said reserved territory became subject to said trust, and thereupon Congress, as was her duty (Perry on Trusts, pages 40 and 41,) passed her said act of August 10th, 1790, and the acts amendatory of the said act, which acts became a part of the series of the acts adopted from Virginia by the said act of March 23, 1804, for extending and limiting the period for locating and returning surveys, &c. Under this system the titles ceased under the 3d section of the said act of March 23d, 1804, if the survey, &c., was not returned to the General Land Office within the period limited, and were revived again on the passage of a new act, (Coke's Littleton, 46*a*, chapter 7, section 58), as in the cases of certain leases for years.

Coke's Littleton, page 290*b*, section 504, Releases.

And it is to be observed that the words of the said act of 13th Elizabeth are:

"Be it therefore declared, ordained, and enacted, and therefore like cases in semblable mischief shall be taken within the remedy of this act by reason of this word (declared), whereby it appeareth what the law was before the making of this act."

In the case of Shipp *vs.* Miller's Heirs, 2d Wheaton, 316, 325, the Court say: "The act of Kentucky of 1797, allowing to infants and *femes covert* 3 years after their several disabilities are removed to complete surveys on their entries, if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the saving of the proviso as to all the other owners."

It is not a statute of limitations simply, but saves a forfeiture to the Government, and so is to be construed strictly against the State.

And so we say of the said acts of Congress of December 19th, 1854 (No. 180); March 3d, 1855 (No. 183); February 18th, 1871 (No. 187), and May 27th, 1880 (No. 195.)

Surveys, &c., were returned to the General Land Office, and patents issued on surveys made and returned to the

land office of the district prior to the 1st day of January, 1852, and the 2d section of the said act of May 27th, 1880, is therefore a decision not only against the Agricultural College of Ohio, but proves my view and construction of these acts to be correct as to the return of survey, &c., on entries made on or before the 1st day of January, 1852, to the General Land Office. The construction is to be strict as against the Government and trustee and liberal toward the owner and *cestui que* trust of the survey, as Congress manifests by the 1st section of said act of 1880, shall be the construction of the said act of February, 1871, ceding the unsurveyed and unsold land in said district to the State of Ohio.

This construction saves a forfeiture, as in the case of Stevens *vs.* McCarge, 9 Wheaton, 502.

Such statute or acts are temporary, and if permitted to expire and be afterwards revived by another statute as in those cases, proceeding thereunder must be referred to the first or former act, the law deriving its force from the first act. (Potter's Dwarris, 153, 159, note 7, and 7 Cranch's Reports, 382 & 570; Peck *vs.* Peas, 5 McLean Reports, 486); and though there be an interval between the expired act and the act reviving it, for every new act in such case is a renewal of the previous acts, and in case of an interval operates a new cause of action and preserves the rights of parties under the original act.

The new act, unless it covers all the old act covered, is only a revival of so much of the old act as the new covers, as in the case of an act that extended the right to obtain warrants and complete surveys, return surveys to the General Land Office, &c. If the new act left out the right to obtain warrants or the right to make new locations they were not revived. Finally, we insist that the said act of May 27th, 1880, only revived the right to make surveys of entries made before January 1st, 1852, and return them to the office of the principal surveyor of the land office of the district. See Galt *vs.* Galloway, in which he defines the

office a land office, and the right to survey was limited to three years, but the right to return "legal surveys," &c., was without limit. The act of February 18th, 1871, was construed by sections 1 and 2 of said act, and by implication of said act of 1880, the 3d section of the act of 1804 was repealed, and it won't do to say that under those acts in which the title is made to cease and is revived by the new act that the land was taxable. The ordinance of 1778 forbids it, and it also forbids the States to be organized out of the territory to interfere with the Government in the disposal of the primary title of the land. All sales of land standing on entry or entry and survey for taxes is therefore void. (See Miscellaneous Document No. 42, page 11, Chamberlain *vs.* Marshall.) This saves the forfeiture of both entries and surveys by the act of 1880 and disposes of the statute of limitation. If the circuit court was right in their construction of said acts before January 1st, 1852, I am right in my construction of them since that date, whether the words land office means the office of the principal surveyor or General Land Office; but if the construction is not the law, then there is no statute to bar them nor authority to tax or to sell the land for taxes.

But whether this is so or not, there has been no occupancy of any of the land to bar the complainant's title except that occupied by the Hughes; but in this case the statute does not run against the United States, the trustee, and unless the trustee is barred the *cestuis que trust* cannot be barred.

Perry on Trusts, vol. —, page —.

These acts of extension also act as remedial statutes, and it is universally held they are to be liberally construed, and that everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon them. (Potter's Dwarris, 72, 73, 74; Cooley on Constitutional Limitations, 357.) It is well-established law that the individual citizen, with all his rights to protection, has no vested right in what is known in the law as

remedies, nor in any particular existing remedy. Whatever belongs merely to the remedy may be altered according to the will of the Legislature and remedies given where none existed before (Cooley on Constitutional Limitations, pages 471, 472), and may be done during the pendency of the action, and even divest title in case the legal and equitable rights do not concur in the same person (357), and this is a proper case.

The citizen has no vested right in a particular defense (Satterlee *vs.* Mathewson), and it may be taken away even after action brought and after the case has been tried and appealed into a superior court, &c.

I most respectfully submit this brief to the court.

JEREMIAH HALL,
Solicitor for Complainant.

IN THE

United States Circuit Court,

NORTHERN DISTRICT OF OHIO,

WESTERN DIVISION.

I. LYDIA M. FUSSELL, *Complainant.*
vs. E. S. HUGHES, *et al.*, *Respondents.* } *In Chancery.*

II. LYDIA M. FUSSELL, *Complainant.*
vs. DANIEL GREGG, *et al.*, *Respondents.* } *In Chancery.*

Argument for Respondents.

WEST, WALKER & WEST, Att'ys.

Bellefontaine Republican Print.

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DANIEL GREGG, *et al.*, *Respondents.*
In Chancery.

BRIEF FOR RESPONDENTS.

These are bills in Chancery involving alleged conflict of locations and surveys in the District of land reserved in Ohio to satisfy the bounties of soldiers in the Virginia line on Continental establishment. They have so many points in common that they may be considered together. I shall endeavor to state the several propositions most strongly against the respondents, and discuss them accordingly.

Until the oral argument at the hearing, I had supposed complainants sought to charge the respondents as trustees and to ask

decree accordingly. But her counsel in argument emphatically and with great vehemence repudiated the idea of trust, or that he sought relief on that ground. His object thus being rendered somewhat obscure, makes a statement of the case necessary.

1. Complainant alleges that on the 19th of July, 1822, warrant No. 6508 for 200 acres was granted by Virginia to her Grandfather, Archibald Gordon, late of Cecil County, Maryland, for services in the Virginia line on Continental establishment in the war of the Revolution.

2. That on the 1st day of January, 1823, he caused said warrant to be located on entry 12017, and the same to be duly recorded.

3. That on the 25th of March, 1823, he carried said location into survey.

4. That on the 5th of November, 1824, he caused said survey to be recorded in the office of the principal surveyor of said District, at Chillicothe.

5. That said Archibald Gordon died intestate about the year 1829, leaving Archibald Gordon, Jr., late of Baltimore, his only child and heir at law.

6. That said Archibald Gordon, Jr., died intestate about the year 1833 or 1834, leaving the Complainant and her sister, Sarah Priscilla, his only children and heirs at law.

7. That Complainant was intermarried on the 1st day of November, 1855, and that her husband died about August 1865.

8. That her sister, Sarah P. was married about the 4th of December, 1848; that she died about May, 1853, leaving Sarah Elizabeth her only child and heir at law; and that her husband died about the year 1855.

9. That said child, Sarah Elizabeth died at the age of nine years, six months and four days, intestate, leaving complainant her sole heir at law.

10. That by direct inheritance from her father, and collateral inheritance through said deceased child, she is seized of the *equitable*

estate in and title to said Survey 12017, and is entitled to the *immediate possession* thereof.

Complainant then avers in the first of said bills:—

1. That on the 25th day of May, 1840, Cadwalader Wallace located warrant No. 6713 on 50 acres, part of said survey 12017; that on the same day he carried the same into survey, which was recorded on the following day in the office of the principal surveyor at Chillicothe, and that on the 8th day of April, 1842, he procured from the United States a patent therefor as survey No. 14530.

2. That some person, to the complainant unknown, without authority from or the knowledge of Complainant, or her ancestors, obtained from the office of said Surveyor said warrant No. 6508, and original survey 12017, and suppresses the same; or that the same have been lost or destroyed.

3. That E. P. Kendrick, the principal Surveyor of said District, subsequent to the issuing of said Wallace patent, wrote the word "withdrawn" upon the record of her said entry and survey, and now refuses to furnish her a duplicate thereof on which to procure a patent.

4. That the Respondents, Hughes and Dennison, occupy said survey No. 14530, claiming title under said Wallace, and wrongfully keep her out of the possession, and refuse to account for rents and profits.

Complainant then prays as follows:—

1. "That the location, entry and survey No. 12017, in the name of her ancestor, Archibald Gordon, founded on said military warrant No. 6508, be established and affirmed, and that the validity thereof be forever perpetuated."

2. "That the location of said Cadwalader Wallace, his entry, survey No. 14530, and patent be adjudged to have been made and issued in violation of the proviso of the Act of Congress of March 1st, 1823, and void."

3. "That the words 'withdrawn,' &c., be adjudged to have been written upon said record without authority."

4. "That the evidence of said military warrant No. 6508, and original survey of said entry No. 12017, be forever perpetuated."

5. "That your Complainant have an order for the delivery of the possession of said premises to her, and that an account be taken of rents and profits, &c."

6. And that she have other relief, &c.

In her bill against Gregg and others Complainant avers, in addition to the first ten avertments above stated, the following:—

1. That on the 4th day of October, 1851, Daniel Gregg located entry No. 16070 on the residue of said survey No. 12017.

2. That he caused the same to be surveyed on the 20th of December, 1851, and the survey thereof to be recorded on the 2nd of November, 1855, and procured a patent therefor on the 20th of November, 1855.

3. That some person, to Complainant unknown, without authority from or knowledge by her, or her ancestors, took said warrant No. 6508, and original survey No. 12017 from the Surveyor's office, and suppresses the same; or they are lost or destroyed.

4. That subsequent to Gregg's entry and survey, E. P. Kendrick wrote "withdrawn" on the record of her entry and survey, and now refuses to give a duplicate thereof to her.

The prayer of this bill is the same as that against Hughes and others.

The Pleas of the Respondents to these several bills:—

1. Deny Complainant's heirship.

2. Deny that her ancestors died seized of an equitable estate.

3. Deny the wrongful entry of the word "withdrawn" on the record.

4. Aver the assignment and conveyance of their equitable estate by her ancestors.

5. Interpose the plea of the Statute of Limitations.

6. And deny the several other allegations.

PROPOSITION.

To enable the Complainant to maintain either of these suits,

she must connect herself with its subject—must show herself cloth ed with some *subsisting* right, interest, or title; that the Respondents, or some of them adversely withhold it, and that Chancery alone has jurisdiction to grant the relief demanded.

I.

Some points not requiring elaborate consideration will first be noticed.

1. The evidence shows that W. P. Hughes never had any interest or occupancy; that, at the commencement of the suits, E. S. Hughes was dead, and Daniel Gregg had conveyed all his interest and delivered possession to the occupants; and that the Marshal returns Mrs. Higgins not found. No decree can be entered against them.

2. Why E. P. Kendrick, the Surveyor of the District, is made a Respondent does not appear. Neither the Bills, nor the evidence, disclose any interest in or occupancy by him. A decree against him will bind nothing and nobody. He is a public officer. If withholding duplicates of the record of the entry and survey is ground for proceeding against him, the remedy is by mandamus after Complainant shall have established her right. Maibury vs. Madison, 1 Cranch 137. The bills as to him must be dismissed.

3. The evidence of Complainant's heirship is vague tradition, hearsay and uncertain. Her parents died in her infancy; she never saw her Grandfather; does not remember to have heard them speak of him, and only remembers to have heard that he was a Revolutionary soldier. Alexander Gordon says that young Archibald left Cecil County about or before 1820, and never returned; that he understood he went somewhere about Baltimore, there married a lady named Hart, and afterwards died. But he never saw him after he left Cecil County. The Court will not make haste, on such slender evidence, to evict occupants under a Government Patent, on a stale equity of fifty years antiquity.

II.

But assuming Complainant's heirship, and the identity of her

ancestors, to have been shown, does she disclose facts entitling her to recover?

1. She avers the suppression or loss of her ancestor's original warrant and survey. Ample provision existed by statute for supplying lost warrants and surveys. Their loss is therefore no ground for the interference of Chancery.

2. Besides, if they are suppressed, or lost, the presumption is that it was by the fault or carelessness of her ancestor. The statute of Virginia, (Act of October, 1783, 11th Henning 353, Sec. 1.,) prescribing the duties of the principal Surveyor of the military district, enacts: "He shall, as soon as it can conveniently be done, and within three months at farthest after making the survey, deliver to his employer, or his order, a fair and true plat and certificate of such survey, the quantity contained, the metes and bounds, &c., * * * * *and shall at the same time redeliver the said warrant to the party.*" The officer will be presumed to have performed his legal duty, and to have delivered said warrant and survey to the senior Gordon, who alone was entitled thereto, as early as 1825 or 1826.

Complainant insists, however, that on the evidence of E. P. Kendrick it is shown to have been customary to note upon the record when and to whom the delivery was made. But he was made principal Surveyor in 1845, and cannot be supposed to have testified as to a custom of the office in 1825. But such memoranda are not required by law to be entered upon the record. Their omission, therefore, raises no presumption that the duty was not performed; nor would the appearance of such entry be conclusive that the fact stated was correct. Only entries required by law to be made are conclusive. Entries not required by law to be made are *prima facie* evidence that the facts stated are correct, until the contrary be shown. *Gault vs. Galloway*, 4 Peters, 331.

III.

Assuming, however, that the preceding points be determined for the Complainant, has she shown herself clothed with any *subsist-*

ing right, interest, or title in the subject matter of these suits?

The Junior Gordon was married in *January, 1827*, to Sarah E. Hart, daughter of Joseph Hart, and sister of Stephen Francis Hart, inadvertently called Francis E. Hart in the pleadings.

Upon the land records of Logan County, Ohio, there is an ancient deed dated June 27, 1827, a certified copy of which is annexed to the deposition of John A. Coulter in the case of this Complainant against Daniel Gregg, et al., and which is in these words:—

"This indenture, made and entered into this twenty-seventh day of June, in the year of our Lord eighteen hundred and twenty-seven, between Archibald Gordon, late of Cecil County, Maryland, of the one part, and Stephen F. Hart, of the County of Baltimore, in the State of Maryland, of the other part, witnesseth, that Archibald Gordon, for and in consideration of one hundred dollars, paid by Joseph Hart, he doth grant, bargain and sell unto Stephen F. Hart, his heirs and assigns forever, *all his lands in Ohio*, Indiana, and Illinois; one tract in Ohio, surveyed on military warrant No. 6508, and on entry No. 12017, by D. S. of Military lands in Ohio, beginning on the waters of Rushcreek, at a stake North West corner to Alexander Parker's survey No. 9958, in the line of Sawyer's survey No. 10239; thence South 12 degrees, East 246 poles to two beeches in the line of Sawyer's to a corner in Aiken's survey No. 10387 and 10388; thence with his line of said survey South 78 degrees, West 134 poles to an ash and beech; thence North 12 degrees, West 246 poles to a hickory and elm in the line of Sawyer's said survey; thence North 78 degrees, East 134 poles to the beginning, containing two hundred acres more or less;"—then describing other lands, it concludes:—"To have and to hold the same forever. In witness whereof the said party of the first part hath hereunto set his hand and affixed his seal, the day and year aforesaid.

"Archibald Gordon [seal.] Signed, sealed and delivered in the presence of John Aisquitti and Samuel T. Dewees.

"State of Maryland,

"Baltimore City, To-wit:

"Be it remembered that on this twenty-seventh day of June, A.

D., one thousand eight hundred and twenty-seven, personally appeared before us the subscribers, two Justices of the Peace, of the State of Maryland, for the city of Baltimore, Archibald Gordon, the grantor to the above deed, and he acknowledged the same to be his act and deed according to the true intent and meaning thereof before us.

JOHN AISQUITTI.
JOHN F. HARRIS."

Certificate of authentication is officially annexed by the proper Court of Baltimore City, Maryland.

The grantor in this deed affirms himself to be the owner of the lands it purports to convey, for he describes it as "all *his* lands in Ohio." We assert, therefore, if Complainant has satisfactorily shown her heirship:—1st, that it is either the deed of her Grandfather, the senior Gordon; or 2nd—that it is the deed of her father, the junior Gordon, to whom the senior Gordon had assigned and transferred his said Survey No. 12017, and muniments of title, as a gift, or otherwise. In either case she is in the attitude of repudiating her ancestor's deed to her kinsman, and is not in a position to charge wrong to the heir of a Revolutionary soldier, by strangers.

Let us first consider the presumption that this ancient deed was made by the senior Gordon. The deposition of Alexander Gordon shows that the senior Gordon lived and died in Cecil County, Maryland, and never permanently resided at Baltimore; and that the *Junior* Gordon from 1820 until his death in 1832 or 1833 resided at Baltimore permanently, and not in Cecil County. This ancient deed gives the boundaries of Survey No. 12017 in the *exact* words and figures of the official land office Record as the same is set out in the Complainant's bill. The grantor must therefore have had in his possession either the original or official copy of the said survey, the official duty of the Surveyor being to deliver it to him as has been shown. The survey was not recorded until November 5, 1824; and said deed was made June 27, 1827; previous to which time it is not shown that the junior Gordon ever saw the said survey, or had any knowledge of its existence.

It is urged, however, that the pension rolls show him to have always signed his pension papers by making his mark, and hence that he could not write; while the signature to this deed is without mark. The pension laws require pensioners who are unlettered to sign their pension papers by their mark; otherwise their pension is withheld. But the law requires no such formality of unlettered persons in subscribing wills or deed, which is often done by others at their direction and request; and especially when attesting witnesses are required to the instrument signed.

It is impossible that said deed could have been executed except from the survey. The strong presumption therefore is that it must have been executed by the senior Gordon, or by his direction or consent.

Again, the grantor assumes to convey "all *his* lands in Ohio," &c. He must have supposed himself to be the owner of what he assumed to convey, for his recital so asserts. This recital is consistent with only one of two hypotheses:—either that the senior Gordon, as original owner and holder of the said official survey, was grantor; or that the junior Gordon, having become owner by gift, grant, or assignment of the original survey, &c., was the grantor. In the absence of proof, however, the former presumption is the stronger, the recital being consistent with his original ownership. Finally, the grantor of the deed is described as Archibald Gordon, late of Cecil County. It is not probable that this form of description would have been employed in respect to the junior Gordon, who then, and for many years before, had permanently resided in and was a citizen of Baltimore. On the assumption that the deed was made by the senior Gordon when temporarily visiting or stopping at Baltimore, the description of him as late of Cecil County is quite natural, thus distinguishing him from the Baltimore Gordon.

In the next place is to be considered the presumptions arising on the assumption that this ancient deed was made by the junior Gordon. What are these presumptions? Obviously and conclusively that he then had in his possession the original or an official

copy of survey No. 12017, so minutely and exactly described in the deed. But whence or from whom must he have obtained it? Certainly from none other than his father, the senior Gordon, who alone was entitled to the possession of these muniments. But how, or by what right, did they pass into the possession of the son? Not by descent, for at the date of the deed the senior Gordon still lived. It can not be presumed that they were stolen by the son. It can not be presumed that he obtained them elsewhere than from his father. The presumption, therefore, is irresistible that, if the son made this ancient deed at all, the documents and muniments of title, the possession of which he must have had, were and had been granted, or given and transferred to him by the father.

This conclusion is strengthened by the recitals of the deed. The grantor describes them as "all *his* lands in Ohio." It can not be presumed that this recital is false; on the contrary the possession of the documents, without which he could not have so exactly described the land, must have come to him by such gift or grant and assignment of the father, as to have induced a belief that it vested the lands in him.

The presumption of such assignment and transfer is not only not unnatural or unreasonable, but consistent with the circumstances. The senior Gordon, was very aged and infirm. These lands were wild, uncultivated, and in the then wilderness of the far west. He could not cultivate or occupy them; they were of little value, and were regarded as of less. That the old man should have assigned and transferred to his son the evidences and muniments of his title to them as a gift, was the dictate of parental affection.

In any view of the case, therefore, it must be concluded that the elder Gordon either himself made the deed, which is the more probable; or that he vested in his son the right and title by grant, assignment and transfer; or other form of consent.

This ancient deed was made in June, 1827. These suits were commenced in 1879. The deed was made either by the senior Gordon, or by the junior Gordon. Thus, after a lapse of fifty-two years

from the making of said deed, and of thirty-seven years from the issuing of patent to Cadwalader Wallace, the granddaughter of the one, and the daughter of the other, repudiates the deed, and assumes to disturb these long time occupants and claimants of title. Will it not be presumed, after the lapse of more than half a century that the senior Gordon made said deed, or that he assigned and granted his interest to the junior Gordon, who made it? Or will no time work a repose of titles and a bar of litigation?

These cases are distinguished in all their features from that of Hart vs. Gregg, (32 O. S. R. 502,) in which the single issue made, and the sole title relied on is stated in the opinion of the Court. It involved so much of the Gordon survey 12017 as is covered by the Gregg survey 16070. The original papers in that case, which I have examined, show the following:—The heirs of Joseph F. Hart, granted under said ancient deed, filed their bill against a portion of the present occupants alleging that Archibald Gordon, the Revolutionary soldier, was the grantor and maker of said deed. Testimony was then taken in the Common Pleas tending to prove that Archibald Gordon, of Baltimore, was the Revolutionary soldier. In the course of the testimony, however, it appeared that Archibald Gordon, the Revolutionary soldier was not Archibald Gordon of Baltimore, but that the latter was probably the son of the former, lately of Cecil County. The only testimony in the case tending to show by whom the deed was executed indicated the son. The Court, without finding by whom the deed was executed, held it insufficient to show that it was executed by the senior Gordon; and as no question of any presumptive grant or assignment was raised, either in the pleadings or evidence, dismissed the Bill. The Complainants then amended their bill, alleging that Archibald Gordon, senior, late of Cecil County, was the Revolutionary soldier to whome said warrant had issued, and for whom said survey No. 12017 had been located; that dying intestate, said land descended to his only son and heir, said Archibald Gordon, junior, of Baltimore, and that said Baltimore Gordon, was the grantor and maker of said ancient deed. The

cause was then appealed to the District Court on this new issue. The sole title relied on, either in the pleadings or evidence, was that of descent from the elder to the younger Gordon; no question of presumed gift, grant, or assignment being raised or made in the case. The evidence disclosed the fact that the elder Gordon did not die until 1828 or 1829. The deed was made in 1827. As there was no claim made in the case that it had been executed by the elder Gordon, the Court, without finding that it had been made by the junior Gordon, assumed for the argument that it was made by him, and then held and decided, that as it must have been made in the life time of the senior Gordon, it could only amount to a deed by an heir of his expectancy, and that his after acquired inheritance could not vest in his previous grantee a title such as could be asserted against strangers occupying and claiming under an independent source of title, and hence, as Hart was only the grantee of such expectancy by quit claim deed, his heirs could not recover against strangers in possession. This was the question that went to the Supreme Court. The syllabus of the decision shows that the Court assumed to pass upon the question of estoppel, which was not in nor necessary to the decision of the case. With due respect for the ability of the Court, I submit that its opinion on that point is not sustained either by authority or the facts in the case. "Such a conveyance," says the syllabus, "cannot operate to defeat the grantors title after acquired by descent, except by way of legal or equitable estoppel;" and Johnson, J., in his opinion, asserts that there is nothing in the deed which amounts to either kind of estoppel; for he adds, "It does not purport to convey *any interest of the grantor* in the premises." It is quite obvious that the Court overlooked those recitals in the deed wherein the grantor assumes to convey "all *his* lands in Ohio," &c., which is certainly the assertion of an interest in the land, because it is the assertion of ownership in the lands conveyed. In Kinsman vs. Loomis, (11 O. R. 475,) cited with approbation in Hart vs. Gregg, this exact question was made and decided. "In that case, the claim was that Swift, the

grantor, had no title at the time of his conveyance, because it did not contain covenants of warranty, but it did contain a *recital*, under a whereas, to the effect that the lawful owner had conveyed to him. It was held that the recital was as effectual as a warranty to bind Swift and his heirs and assigns.

The conclusion therefore is this, said deed was made either by the senior Gordon or by the junior Gordon. If by the senior, the plaintiff has no title. If by the junior, his recitals in the deed that the lands which he conveys are "*his lands*," are certainly as effectual to bind his heirs as were the recitals in Kinsman vs. Loomis to bind the heirs of Swift.

If this conclusion required more to support it, the presumptive grant and assignment by the senior Gordon to the junior Gordon must preponderate in favor of the immemorial occupants honestly believing their title sufficient.

Determining the equities for the Respondent on this point, will dispose of the cases, but nothing more. It is desirable, however, to dispose of them on grounds which, if possible, shall settle some general principle, giving repose to titles of thousands of homes in this fertile but shark infested district. To this end the legislation on the subject will next be considered, with a view to ascertain if the Complainant be not concluded by the provisions of positive law.

IV.

Complainants counsel contended in argument, on the authority of Latham vs. Oppy, (18 O. R. 104,) that the Wallace patent was void because his survey does not coincide with his entry. In her Bills she avers that both patents are void on the alleged ground that they were obtained contrary to the act of March 1, 1823. Unless she show herself clothed with some superior subsisting right, interest, or equity, prejudiced thereby, entitling her to object, it is immaterial to the present issue whether the Wallace entry and survey coincide or not, or that his patent be founded on any survey, or that both patents may have been obtained in violation of all the legislation on the statute book. Is she clothed with such right, interest,

or equity; or if she ever was, have they been barred and extinguished by positive enactment?

On the 23d day of March, 1804, Congress enacted a peremptory and most stringent statute of limitations, II U. S. Laws 274, as follows:

"Section 2. That all the officers and soldiers, or their legal representatives, who are entitled to bounty lands within the above mentioned reserved territory, (Virginia Military,) shall complete their locations within three years after the passing of this act; and every such officer and soldier, or his legal representative, whose bounty land has or shall have been located within that part of the said territory to which the Indian title has been extinguished, shall make return of his or their surveys to the secretary of the department of war, within five years after the passing of this act, and shall also exhibit and file with the said secretary, and within the same time, the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept: which warrant, or certified copy thereof, shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land; and every person entitled to said lands, and *thus applying*, shall thereupon be entitled to receive a patent in the manner prescribed by law."

"Section 3. That such part of the above mentioned reserved territory, (Virginia Military,) as shall not have been located, and those tracts of land, within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the secretary of war, within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty lands."

If Congress had authority to pass this act, it is obvious that a failure within the time limited to return any survey, made previous to its expiration, operated, on its expiration, as an unconditional release, discharge and extinguishment of all right, interest, or equita-

ble title previously acquired; and such unreturned survey lapsed into the residuary mass of lands belonging to the Government the same as if no survey thereof had ever been made. That it had such authority, a reference to the terms of the reservation, and the adjudication upon it, will show. In the war for Independence, Virginia, claiming title by grant from the British crown to the territory on both sides of the Ohio river as far North as the Connecticut or Western Reserve, pledged to the officers and soldiers of her Continental Line, bounty lands to be laid off to them between the Cumberland and Green rivers. Under the cession to the United States by Virginia, in 1784, of her Northwestern territory, so much thereof, lying between the Little Miami and Scioto rivers, as might be necessary therefor, after exhausting the good lands on the Green river, was in primary trust to satisfy such bounties; and the remainder in residuary trust for the several states, out of which to raise a fund and discharge their respective liabilities incurred in the war. The twofold trust thus created, vested in the Government not only the authority, but the duty, of so limiting the time within which to exercise their primary option by the beneficiaries of Virginia's bounty, as not to indefinitely postpone the enjoyment of, or practically defeat the residuary trust.

"Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust." Jackson vs. Clark, 1 Peters, 628.

The authority of Congress to pass the act of 1804, and the subsequent acts on the same subject, is thus confirmed. The limitation prescribed by it for locating warrants and returning surveys, was extended by the act of March 2, 1807, II, U. S. Laws 424, as follows:

Sec. 1. "That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands within the tract reserved by Virginia, between the Little Miami and Scioto rivers * * * * shall be allowed a further time of three years, from the 23d of March next, to complete their locations, and a further time of five years, from the said twenty-third of March next, to return their surveys and warrants, or certified copies of warrants, to the office of secretary of the war department. * * * * * *Provided*, that no locations, as aforesaid, within the above mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered null and void."

This act of March 2, 1807, with slight variations, extending the period of limitation, was re-enacted eleven times. The act of April 11, 1818, III U. S. Laws, 423, provided that said officers and soldiers, &c., "shall be allowed a further term of two years, from the ratification of any treaty extinguishing the Indian title to lands within the said boundaries not heretofore extinguished, to obtain warrants and complete their locations; and a further term of three years, from the ratification of any treaty as aforesaid * * to return their surveys and warrants, or certified copies of warrants, to the general land office; any thing in any former act to the contrary notwithstanding."

Section two extends the time for locating "Resolution warrants," and then adds:—"*Provided*, That no locations, as aforesaid, in virtue of this, or the preceding, section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this act, shall be considered null and void:—*Provided also*, That no locations or surveys shall be made within that part of the said

military tract to which the Indian title remained heretofore unextinguished, until after six months shall have elapsed from the date of a proclamation of the President of the United States, declaring a treaty or treaties to have been concluded and ratified, providing for the extinguishment of the Indian title to such lands; nor shall any patent be granted for any location, survey, or entry, that has been, or shall be, made prior to the expiration of six months from and after the ratification of such treaty."

The act of February 9, 1821, III U. S. Laws, 612, re-enacts, in almost exact terms, the act of March 2, 1807, extending the time for making locations two years, and of making and returning surveys, four years; the Proviso being the same.

The act of March 1, 1823, III U. S. Laws, 772, re-enacts in terms that of 1821, with the proviso, extending the time two and four years respectively.

The act of May 20, 1826, IV U. S. Laws, 189, re-enacts that of 1823, with its proviso, extending the time for making locations to June 1, 1829; for making surveys to June 1, 1832; and for returning surveys to June 1, 1833. After this act expired an interregnum of five years occurred, during which no authority existed for making locations, surveys, or returns.

On the 7th of July, 1838, V U. S. Laws, 262, the time for making locations, surveys and returns was extended to the 10th day of August, 1840. This act then provides:—"and all entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants, on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held good and valid, *any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding: Provided*, That no locations *as aforesaid*, within the above mentioned tract, shall, after the passage of this act, be made on tracts of land which may have been previously patented, or which may have been surveyed in satisfaction of warrants granted for the legal bounties of said officers and soldiers:—*And provided, also*, That no

locations *as aforesaid* shall be made on any lands lying upon the West side of Ludlow's line; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act, shall be held and considered as null and void."

On the 19th of August, 1841, V U. S. Laws, 449, the act of 1838 was "revived and continued in force" until January 1, 1844.

Again, in 1846, IX U. S. Laws, 41, it was "revived and continued in force" until the 1st day of January, 1848.

Again, on the 5th day of July, 1848, IX U. S. Laws, 245, it was "revived and continued in force" until January 1, 1850.

Again, on the 20th of February, 1850, IX U. S. Laws, 420, it was "revived and continued in force" until Jannary 1, 1852. This is the last act by which the time was extended, or authority given for making locations of Virginia Military Warrants on any lands within the reservation.

The act of March 23, 1804, stands unrepealed by any subsequent legislation. The time limited by its second section was extended from time to time, by twelve successive supplementary acts until the 1st of January, 1852, for making locations and surveys, and the return of surveys and warrants, or copies of warrants, to the Commissioner of the General Land Office; but the section was never repealed.

The 3rd Section of the act of 1804 was never supplemented nor repealed. Its operation was suspended from time to time by said successive acts extending the period of limitation prescribed in its second section. So that when the final period of extension expired on the 1st of January, 1852, the provisions of the 3d Section came into full force and operation. Several statutes, *in pari materia*, must be construed as one. Hence on the 1st day of January, 1852, the legislation on the subject was as if the act of March 23, 1804, amended by incorporating the provisions of the act of July 7, 1838, had, on said last day, been re-enacted to read as follows:—

Sec. 2. The officers and soldiers of the Virginia Continental line, their heirs, or assigns, &c., shall be allowed until the 1st day of

January, 1852, to make their locations, within which further time they shall complete the same; and they shall, within the same time, make return of their surveys to the Commissioner of the General Land Office; and shall, within the same time, exhibit and file with the said Commissioner the original warrant or warrants under which they respectively claim, or a certified copy thereof, under the seal of the office where the said warrants are legally kept; which warrants, or a certified copy thereof, shall be sufficient evidence that the grantee therein named, or the person under whom such grantee claims, was originally entitled to such bounty land: and every person entitled to said lands, and thus applying, shall thereupon be entitled to receive a patent in the manner prescribed by law:—*Provided*, That all entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants, on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held to be good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding: *And Provided*, That no locations *as aforesaid*, within the said reservation, shall, after the passage of this act, be made on tracts of land which may have been previously patented, or which may have been surveyed in satisfaction of warrants granted for the legal bounties of said officers and soldiers: *And Provided, also*, That no locations *as aforesaid* shall be made on any lands lying upon the West side of Ludlow's line; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act, shall be held and considered as null and void.

Sec. 3. "That such part of said reservation as shall not have been located, *and those tracts of land, the surveys of which shall not have been returned* to the Commissioner of the General Land Office, *within the time prescribed by this act*, shall thenceforth be *released* from any claim or claims for such bounty lands; and shall be disposed of, &c."

The act of 1838, so "revived and contined in force," was the last

by which time was extended, or authority given for making locations; or for returning to the General Land Office surveys made previous to the 1st of January, 1852. The Gordon Entry No. 12017 was both located and surveyed previous to that date, and is therefore within the exclusive purview of legislation prior to that date.

There is another class of locations, to which that of Gordon does not belong, which fall within the exclusive purview of the act of March 3, 1855, X U. S. Laws, 701. They are those locations which, on January 1, 1852, stood upon *entry* only, but had not, previous to that date, been carried into survey. To relieve in case of such unsurveyed locations only, the act of March 3, 1855, was passed. This is manifest from its express terms, which are as follows:—

"An Act allowing the further time of two years to those holding Lands *by Entries* in the Virginia Military District in Ohio, which were made prior to the first of January, eighteen hundred and fifty-two, *to have the same surveyed* and patented.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands, which have, prior to the first day of January, Anno Domini eighteen hundred and fifty-two, been *entered* within the tract reserved by Virginia, between the Little Miami and Scioto Rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed the further time of two years from and after the passage of this act *to make and return their surveys* and warrants, or certified copies of warrants, to the General Land Office."

If doubt were possible that the sense and intent of this act included only *entries* which, on January 1, 1852, remained unsurveyed, it is dispelled by the clear and unequivocal language of its title.

The Gordon Entry No. 12017 was surveyed in 1823. The Wallace Survey was made in 1840. The Gregg Survey was made in 1851. Neither of them stood on entry only, on the 1st of January,

1852, and hence, as to them no time was extended, nor rights saved by the act of March 3, 1855.

The reason is obvious. Former acts gave one time within which to locate entries, and a longer time within which to make and return surveys. The act of 1838, which expired January 1, 1852, made no such distinction. Authority to locate entries continued until the 31st of December, 1851. Many were located on a day too late to make surveys thereof. On the 1st of January, 1852, these unsurveyed locations stood upon entry only. To enable the locators of such unsurveyed entries to make surveys thereof and return the same, the act of March 3, 1855, was passed, and had no other purpose or intent. It does not, nor was intended, to include surveys which had been made prior to January 1, 1852, nor to extend the time for returning such prior surveys. Hence the Gordon Survey No. 12017, the Wallace Survey No. 14530, and the Gregg Survey No. 16070, having each been made prior to January 1, 1852, are not, nor are the rights, interests, or titles of their several proprietors affected by the act of 1855, but must be governed and disposed of by the laws in force on the 1st of January, 1852.

But an end is put to controversy about the scope and meaning of this statute, by the legislative interpretation given to it in the second section of the act of May 27th, 1880, (Statutes of that date page 143,) which reads thus:—

"SEC. 2nd. All legal surveys returned to the Land Office on or before March 3d, 1857, on entries made on or before January 1st, 1852, and founded on unsatisfied Virginia Military Continental warrants, are hereby declared valid."

If surveys made, but not returned to the Land Office prior to 1852, were within the statute of 1855, the subsequent returns thereof would have been valid without the legislation of 1880. But because they were not within the said statute, and the subsequent returns thereof, being made without authority, were null and void, and the surveys dead, the exertion of legislative power was necessary to re-

animate and give them validity; hence, the second section of the act of 1880 was passed.

But Complainant's survey is not within the purview of said section, because no return thereof was ever made to the Land Office either before or since March 3d, 1857; and as it is not within the act of 1855, it stands where the act of 1804 placed it on the 1st of January, 1852.

Successive statutes, in substantially identical terms, on the same subject matter, must be held identical in scope and meaning. The 3d Section of the act of May 27, 1880, (U. S. L. 1879-1880, page 143,) is a re-enactment in substantially identical terms of the above cited act of March 3, 1855, and reads thus:—"That the officers and soldiers of the Virginia line on Continental establishment, their heirs, or assigns, entitled to bounty-lands, which have, or on or before January first, eighteen hundred and fifty-two, been entered within the tract reserved by Virginia, between the Little Miami and Scioto Rivers, for satisfying the legal bounties to her officers and soldiers upon Continental establishment, shall be allowed three years from and after the passage of this act to make and return their surveys for record to the office of the principal surveyor of said district, and may file their plats and certificates, warrants, or certified copies of warrants, at the General Land Office, and receive patents for the same."

This act, like that of March 3, 1855, with which it is substantially identical, includes tracts, which on the 1st of January, 1852, stood upon unsurveyed entries only, and excludes those, which, like the Complainant's, stood on entry and survey, before that time made, but not returned to the General Land Office.

Having brushed away the clouds, let the provisions of these statutes be now applied. The omission to do an act within a time prescribed, which is by statute made the condition of saving a right, works its release and extinguishment. Rickner against Warner 22 O. S. R. 75. The Statute of March 23, 1804, as supplemented and extended by the act of July 7, 1838, and the several acts reviving

and continuing it in force, made the return to the Commissioner of the General Land Office prior to January 1, 1852, of all surveys, before that time run off, together with the warrants, or certified copies of warrants under which located, the condition of saving them from release and extinguishment, and of preserving to their respective proprietors any right, title or claim thereto. The Gordon Survey No. 12017 was made previous to January 1, 1852; but no return thereof, or of the warrant under which located, was ever made. The omission to make such return, and comply with the statutory condition, within the time prescribed, worked the release and extinguishment of the survey, and of whatever right, claim, or title the Complainant, or her ancestors, ever had thereto; so that since January 1st, 1852, she has been and is without right, interest, estate or title in or to the subject-matter of these suits.

One without right or interest can not maintain an action either at law or in equity; so that an action, as in this case, against one in possession, even if shown to be without right, can not be maintained by another, who is without right. It is therefore wholly immaterial whether Respondent's Patents may have been obtained contrary to some statute, or be invalid on other grounds; the statute of 1804 having extinguished all right, interest and title of the Complainant, annulled her survey, and merged the tract covered by it in the residuum of unappropriated lands belonging to the government she cannot maintain this action. She is without authority to make return; is without right which she can assert against the government; is without interest or title to support a demand for the issuing of a patent; and hence, is without interest or equity, which the Respondents can prejudice, or which entitle her to object to the validity of their patent. This disposes of these causes adversely to the Complainant by force and operation of positive statute.

V.

The defense might here be rested. But, as an intelligent and satisfactory opinion by the court must embody a discussion of the Respondent's title, its character will next be considered.

Complainant's averment that their patents were obtained contrary to the act of March 1, 1823, is immaterial if true. But its truth is impossible.

The date of the forbidden *location*, not the date of the survey with which it conflicts, determines which particular one of these statutes it violates. A consideration of their provisions will make this manifest.

The act of March 23, 1804, prescribed a limited period within which entries might be located and surveys made and returned; upon the expiration of which all authority to make locations, legal or otherwise, should cease. Each of the successive statutes extended this time and authority for a limited period, annexing thereto a proviso prohibiting the making of locations on certain designated lands, and nullifying the patents that might be issued thereunder. Each of said successive statutes was an independent act, the duration and authority of each expiring by its own limitation.

Making locations was an official act, which could only be performed by the proper public officer acting, after 1804, under authority given by some one of these temporary statutes. It was done by writing an entry thereof in an official book giving thereto its proper date. While the authority continued, it was possible, and often occurred, that by inadvertance or mistake, conflicting locations found their way into this book; to avert the unjust consequences of which it was deemed necessary to affix the nullifying proviso to each successive act extending it. On the expiration of such authority, the book of entries would necessarily close, and any attempted location made therein be a nullity without positive prohibition, because *ultra vires*. Hence no locations have been made, conflicting or otherwise, since January 1, 1852.

The act of March 1, 1823, was a temporary extension of this authority. By it, the further time of two years was allowed for completing locations, and of four years for making and returning surveys, &c.; *Proviso*, that no *locations as aforesaid* shall be made on tracts which had been previously patented or surveyed; and any

patent which may nevertheless be obtained for lands *located* contrary to this act shall be considered null and void.

"Locations as aforesaid" is plainly restricted in sense and intendment, to forbidden locations which might be made during the period and under color of the temporary authority extended by this act. The forbidden location is the thing denounced; the patent obtained as the fruit of such location is the thing nullified. The authors of the act must be presumed to have intended that on and after the expiration of the temporary authority given by it, the book of entries would close, and the making of locations therein cease. They can not, then, be presumed, by the term "locations as aforesaid" to have contemplated the possibility of locations after the authority to make them should expire. Hence, as the forbidden location is the foundation of the patent nullified, to bring a patent within the nullifying proviso of any particular one of these temporary statutes, the location on which it issued must have been made under color of its authority, while it continued in force. A location contravening a statute dead at the time made is impossible. The Wallace and Gregg locations were made under the act of July 7, 1838, ten years after the act of 1823 had expired. The lands covered by them could not have been *located* contrary to this defunct statute. If they violated either, it was the living statute of 1838.

When the act of 1810, giving further time and authority to make locations, was enacted, the prohibitory proviso of 1807 was re-enacted, for the reason that it was supposed not to embrace or nullify locations other than those made during the three years said act of 1807 continued in force. The same is true of the acts of 1814, 1818, 1821, 1823, and 1826 respectively. Each of said acts nullified, and was intended to nullify, prohibited locations made during its existence, and no others. Each act in succession took under its protection the rights of individuals in all tracts previously patented, or surveyed, no matter when, and preserved them until their protection was assumed by the succeeding act; on the expira-

tion of the last of which, such as had failed to make returns were lost and extinguished.

Complainant assumes that because the Gordon survey was made under the act of March 1, 1823, it is under the perpetual and exclusive protection of that act against prohibited location whenever made. This is impossible. It passed into the protection of the act of 1826, and there continued until the 1st of June, 1833, when the act expired; that of 1804 came into full force and operation, and the Gordon survey, with all others, the returns of which had not been made, was annulled and extinguished. It so remained a dead survey until revived and reanimated by the act of July 7, 1838, under the protection of which it continued until January 1, 1852, when it expired with the act which sustained it, and was finally and permanently extinguished by the 3rd section of the act of 1804, within the operation of which it then fell, and has since remained.

It follows, then, that if the Wallace entry of May 25, 1840, or the Gregg entry of November, 1851, was "located contrary to" any statute, it was that of July, 1838, then in force, and not that of March 1, 1823, which was not then in force.

It will now be inquired whether the Wallace patent No. 14530, or the Gregg patent No. 16070, was obtained for lands located contrary to the act of March 7, 1838, under which their locations were made. That act, as revived and continued in force by the act of February 20, 1850, allowed the further time until January 1, 1852, to complete locations, make surveys, and return surveys which had been, or within said time might be made; "*Provided*, That no *locations as aforesaid*, within the above mentioned tract, shall, after the passage of this act, be made on tracts of land which may have been previously patented, or which may have been surveyed in satisfaction of warrants granted for the legal bounties of said officers and soldiers: *And provided, also*, * * * That any patent which may nevertheless be obtained for land LOCATED contrary to the provisions of this act, shall be held and considered as null and void."

To bring either of the Respondents' patents within the operation of this proviso, it must be shown to have been obtained for lands *"located"* contrary to its provisions. A patent for lands under a location made on a previously void entry,—Stubblefield vs. Boggs 2 O. S. R. 216—or upon a survey not founded on previous entry,—Latham vs. Oppy, 18 O. R. 104,—is not within its operation. There must be a subsisting, valid survey, resting upon a subsisting entry, upon which a prohibited location has been made, to bring the patent issued thereon within the statute.

The Wallace entry No. 14530 was *"located"* on the *West* side of the *West line* of the Gordon survey No. 12017. His survey lies wholly on the *East* side of said line; and his patent coincides with the survey. His *location* was not upon any lands previously patented or surveyed. His patent was, therefore, not for lands located contrary to the said proviso, and is not within its operation. It may have been a patent improvidently issued, vesting the legal title in trust for a superior equity, but is not null and void by force of the statute, within which it does not fall.

Assuming that Complainant's survey had never been alienated nor withdrawn; and that, when the Gregg entry and survey were made in 1851, it was a valid, subsisting survey, in which her equities inhered; yet neither her survey, nor that of Gregg, having, with the warrants on which founded, or certified copies thereof, been returned to the Land Office previous to January 1, 1852, both, on that day, became obliterated and extinguished, and the land covered by them merged in the residuum of vacant public lands, as completely and absolutely as if no location or survey thereon had ever been made. They were then, by the statute of 1804, wiped from existence, and have not since been revived. So that, when the Gregg patent issued on the 20th of November, 1855, it was for vacant, unappropriated land of the Government as absolutely as if it had issued for any other tract of unappropriated public lands to which no individual right, equity, or title had ever attached. It may have been improvidently issued, but it passed the legal title to and vest-

ed it in Gregg, by whose conveyance it is now held by the Respondents, unaffected by any title or claim, legal or equitable, of the Complainant.

VI.

Assuming for argument, however, that the Complainant had and still has an equity prejudiced by these patents, and that they were obtained contrary to the statute, it is next to be inquired what are her present rights, and what her remedy.

Complainant avers that she is seized of the *equitable title;* also that she is entitled to the *immediate possession*, and prays that its delivery be adjudged to her. This latter averment and prayer is appropriate to ejectment. But it has been settled by a long course of judicial decisions, State and Federal,—Dresback vs. McArthur, 7 O. R., 1st Pt 146: Brightley's Federal Digest, Ejectment I-1:—as well as by statute,—Civil Code, Section 558,—that in Ohio an equitable title only will not support a possessory action.

The averment that Complainant is seized of the equitable title is ground for equitable relief only against him who holds the legal title adversely. Where it is claimed, or appears, that the Respondent is a mere trespasser or intruder, without color of title, equity will not interfere, but leave the party to his action at law, after he shall have clothed himself with the legal title. This is settled in Galt vs. Galloway 4 Peters 331. In that case, it appeared that Galt, by his agent, Westfall, in 1787 entered 1000 acres on the Miami River; and in 1796 procured it to be surveyed. In 1800 Galt died. His entire survey was a valid subsisting survey on the 2nd of March 1807, when the act of that date, with its proviso, was passed, and continuously thereafter. In 1808 Galloway located another warrant on the 400 acres, part of the said survey; and in 1809 procured a survey of and patent for the same. He then sold and conveyed the said 400 acres to Gibson and others, who entered and took possession, and made valuable improvements thereon. No patent had issued to any one for the remaining 600 acres. Westfall, fraudulently claiming to be the owner, made a deed for it to sundry par-

ties, who also entered and took possession. Previous to 1830, Galt's heirs commenced in the U. S. Circuit Court a suit in equity against all the occupants of the entire 1000 acres, which was appealed to and decided by the Supreme Court in 1830. That Court denied all relief in equity against, and dismissed the Bill as to, the occupants of the unpatented 600 acres, leaving the Complainants to their action at law after they should have clothed themselves with the legal title. As to the occupants of the 400 acres for which patent had issued to Galloway contrary to the act of March 2, 1807, the Court decreed "that said occupants do, on or before November 1, 1830, execute to the Complainants, jointly or severally, a release of their interest in the premises; *provided, that before that time they shall have been paid for their improvements, under the statute of Ohio.*"

This decree rests on the principle enunciated in Brush vs. Ware, 15 Peters 107, 2d paragraph, that "a patent appropriates the land called for, and is conclusive against rights subsequently acquired. But where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined. The patent, under the Virginia land law, as modified by usage and judicial construction in Kentucky and Ohio, conveys the legal title, but leaves all equities open." And on page 108 it is further stated, that "unless affected by the statute of limitations, or the lapse of time, any equity, arising from the face of the instrument, or of which the grantee is charged with notice, may be asserted against him."

The rule deduced from the adjudications, in case of such patent, is, as I understand it, that the patent, so obtained contrary to the proviso of the statutes, will not be recognized as authority for decreeing *affirmative* relief against one having such interest in or connection with its subject-matter as entitles him *at the time* to question and dispute it. Harlan's heirs vs. Thatcher 18 O. R. 48; Thomas vs. White et al. 2 O. S. R. 540.

But when assailed in equity, by one entitled to attack and impeach it, the patent will be decreed to have vested the title in trust,

and a release and conveyance will be ordered, if the right is not barred. Galt vs. Galloway, 4th Peters 331.

The authorities cited by Complainant's counsel to sustain a contrary doctrine to that of Galt vs. Galloway, and that occupants under such patent are mere trespassers and intruders, holding without color of title, do not support it. In Stubblefield vs. Boggs, 2 O. S. R. 216, the question was whether a senior survey and patent, founded on a junior entry, should prevail over a junior survey and patent founded on a senior entry void, because made in the name of a dead man. Neither the statute of 1807, nor the subsequent acts, were involved. The Court merely cite them to show that they had no application to that case; and whatever is said beyond this is *obiter dicta*. In Harlan's heirs vs. Thatcher, and Thomas vs. White, *affirmative* relief was prayed. In Latham vs. Oppy, 18 O. R., 104, the question was whether a survey, not founded on a previous entry, was protected by these statutes, or came within their provisions.

These authorities do not contravene the doctrine of Galt vs. Galloway and Brush vs. Ware, above cited.

Complainant's counsel, in argument, as before stated, vehemently asserted that the Respondents' Patents vest in them no color of title, either legal or equitable, in trust or otherwise; and that they are mere intruders and trespassers, whom he disdains to charge as trustees, or against whom to ask a decree of release and conveyance.

The Complainant is now either clothed with a subsisting equitable estate, entitling her to demand and receive from the Government a patent vesting in her the legal title; or, by the statute of March 23, 1804, whatever of interest or estate she may have had was on the 1st of January, 1852, wholly lost and extinguished, and she divested of all right to claim or receive from the government such patent. If the former, and the Court accept the assertions of her counsel, that Respondents are mere intruders, then relief in equity must be denied to her, and she be remitted to her action at law after she shall have, by obtaining patent, clothed herself with the le-

gal title. If she have no subsisting interest or estate entitling her to demand and receive a patent from the government, relief must be denied and her Bills dismissed, for an action neither at law nor in equity can be maintained against the Respondents even though they be without color of title, by one who is also without interest or title.

VII.

The nature of the relief asked, and whether grantable in equity, merit notice. Complainant shows that by failure of herself and ancestors to comply with the conditions prescribed by the act of March 23, 1804, she is now, and for more than 30 years has been, without right, interest, or equity, entitling her to demand or receive a patent from the government. Yet she asks and demands that this Court shall disregard the authority, or usurp the functions of the Legislature, and restore to her by decree that of which she has been deprived by statute. She declines to ask a decree for title against the Respondent; but demands that her survey and location, with the evidences thereof, annulled by the statute, be revived and reanimated by decree, and that her title be forever perpetuated. This is virtually and in effect the demand for judgment against the Government, and that it be decreed a perpetual trustee, holding in trust for the Complainant a legal title, which, by act of Congress, it is prohibited from granting to her by patent. How this Court can enter or enforce such degree is not apparent.

VIII.

The prayer of these Bills has been ingeniously framed, declining to ask that a trust be decreed, or the Respondents ordered to release and convey, obviously thinking thereby to avoid the authority of Galt vs. Galloway and Brush vs. Ware, and the Ohio Statute of Limitations. Are they within and barred by that statute?

Formerly the bar from lapse of time was applied to suits in equity by way of analogy only, the statutes of limitation not embracing them. This bar was accordingly moulded and applied in the discretion of the chancellor as the facts and circumstances of

the case might determine him. Weaver's heirs vs. Froman 6 J. J. Marshall Ky. R., 214, cited by counsel in argument, is an example.

If these suits had been brought in the State Court, it must have been under the Code of Civil Procedure; and the State Statutes, controlling Complainant's rights therein, will follow and control them in the Federal Court, in all matters of substance. As above shown, the Wallace patent was not obtained for lands *located* contrary to the Federal statutes; but upon a survey without previous location. The Gregg patent was issued for land then as completely vacant and unappropriated as the unsurveyed wilderness of Montana; the act of 1804 having extinguished and removed all preexisting rights, claims and equities. But assuming that these patents were obtained contrary to the statute, as in Galt vs. Galloway; and that Complainant has a subsisting equity entitling her to attack them unless barred by time, are her actions within the statute? I will first consider the question in reference to the Gregg patent 16070.

The Code of Civil Procedure took effect July 1, 1853. The Gregg patent issued November 20, 1855, and possession was taken under it in 1856. Complainant was married November 1, 1855, but has been a widow since July, 1865. Her niece, Sarah Elizabeth Kelly, died intestate not later than April, 1860, at the age of nine years and six months, leaving Complainant her sole heir.

1. The 3d Section of the Code of Civil Procedure reads as follows:—"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place, there shall be, hereafter, but one form of action, which shall be called a *civil action*." Wherever the term "civil action" subsequently appears in the Code, it has the sense and scope given to it in this section.

Formerly judicial proceedings were of two general classes, suits in equity and actions at law. The former were prosecuted by Bill in Chancery; the latter, under some one of the seven common law forms of procedure, by Declaration. These different forms or

modes of procedure are abolished, the Code substituting therefor one common form of civil action by Petition; the ancient distinction in substance between suits in equity and actions at law remaining unchanged. In Dixon vs. Caldwell, 15 O. S. R., 413, it is said:—"The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the code." In Green and Kelly on Ohio Pleading and Practice, page 128, where the authorities are collected, it is stated that the distinction between actions at law and suits in equity, abolished by the Code, is in matter of form only, and not in their substance and inherent nature. So in Pomeroy on Rights and Remedies, 37, Sec. 37. In Chinn vs. Trustees, &c., 32 O. S. R., 236, "The civil action of the code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity." In Hager vs. Reed, 11 O. S. R. 626, 635, the Court say:—The action of the Code will be regarded and treated as a civil action at law or a civil action in chancery accordingly as the facts alleged and the relief proper shall determine.

A cause of action properly prosecuted in the Federal Court by Bill in Chancery would, therefore, if prosecuted in the State Court be by the civil action in Chancery under the Code, which embraces the ancient suit in equity.

2. The 8th Section of the Code reads thus: "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued."

The term "civil action" in this section is in scope and sense the same as defined in the 3d Section; and embraces what were formerly known as actions at law and suits in equity. This is distinctly affirmed in Chinn vs. Trustees, &c., 32 O. S. R., 236, wherein the

court say:—"The limitations of the code of civil procedure, as to the time of commencing civil actions, are applicable, as a bar, to suits comprehended within the civil action of the code. The civil action of the code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity.', The application of the lapse of time as a bar to civil actions in equity under the code, is no longer matter of analogy, or judicial discretion, but of judicial and statutory obligation.

3. The 9th Section of the Code reads thus: "An action for the recovery of the title, or possession of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued." The term "action" in this Section necessarily means "civil action," as defined in Section 3d and employed in Section 8th.

Real actions are of two general classes:—one, the civil action of the code in chancery to recover the *legal title* to lands against him who holds it adversely; the other, the civil action of the code at law, as ejectment, to recover the *possession* of land against him who holds it adversely. In the one the right to the legal title, in the other the right to the actual possession, is the subject matter controverted. To maintain the former, the Complainant must show himself vested with a *subsisting* equitable estate, coupled with the right to have the legal decreed to him;—to maintain the latter, he must show himself already vested with the legal estate as the foundation of his right to recover the possession. Each of these classes under the Ohio Code must be prosecuted by the civil action thereof, and is therefore within the express terms and limitations of Title II, Sections 8th and 9th of the Code.

The Complainant's proceeding is somewhat nondescript. It is not an action at law, as ejectment. It must, therefore, be a suit in equity to recover the legal title, or some other equivalent relief which, if brought within the State Court, must have been by the civil action in chancery, and as such subject to the restrictions and limitations imposed by sections 8th and 9th of the Code.

4. Is her right and remedy barred by this Statute? To start the running of the Statute as to the first class of real actions, the legal title, to recover which the Complainant asserts the equitable right, must be held adversely by some one capable of being sued. As the Government cannot be sued, the Statute of Limitations does not begin to run against the equitable owner of lands, so long as the legal title thereto remains vested in it. Clark vs. Southard's Heirs, 16 O. S. R., 408. But upon the instant that the legal title passes from the Government, it is liable to be affected by the statute of limitations, or lapse of time. If vested in one not equitably entitled, the right instantly accrues to recover it from him, if adversely held, and the running of the statute begins. If the Complainant's present action be well brought, she might have brought it with equal right thirty years ago. Hence, the running of the statute began thirty years ago; and its bar is now complete, as will next be shown.

Let the 9th and 10th Sections of the Code be read together: Section IX. "An action for the recovery of the *title*, or *possession* of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued." Section X. "If a person entitled to commence any action for the recovery of the *title* or *possession* of any lands, tenements, or hereditaments, be at the time his right or title shall *first descend* or *accrue*, within the age of twenty-one years, or a married woman, * * every such person may, *after the expiration of twenty-one years from the time his right or title first descended* or *accrued*, bring such action within ten years *after such disability is removed, and at no time thereafter.*"

This language is unambiguous. The running of the statute begins when the right first descends or accrues; and expires at the end of twenty-one years, unless extended by disability, which, in case of infant females, is never beyond twenty-eight years, and in case of infant males, never beyond thirty-one years. The ten years saving after disability removed may, or may not, extend the limitation be-

yond twenty-one years, depending on the date of its removal. If it be removed more than ten years before the expiration of the twenty-one, the period will not be extended. If it be removed less than ten years before the expiration of the twenty-one, it will be extended a time equal to the unelapsed portion of the ten years remaining at the expiration of the twenty-one. Or it may be stated thus:—In all cases where the disability is removed at the end of *eleven or more* years from the first descending or accruing of the right, such time plus ten years will give the whole period within which the action may be commenced from the time when it first descended or accrued. If the disability be removed *less than eleven* years from the time the right first descended, or accrued, the twenty-one years will not be extended. This construction was given to the statute of 1831, with which the present statute is identical in terms in Walker et al vs. Knight, 12 O. S. R., 209, where the act of 1831 is copied. In that case a right descended in 1827 to two infants, whose disabilities were removed in 1837 and 1839 respectively. Action was brought in 1850. But the Court held, that, as to the elder, the limitation expired at the end of twenty-one years, and as to the younger, at the expiration of twenty-two years, after the right first descended in 1827.

In Slater vs. Cave, 3 O. S. R. 80, it was held that the disability of infancy in the case of a female was removed at 18. Complainant's sister was married December 4, 1848, and died May 12, 1853. Her child died at the age of nine years and six months, but *when*, the evidence does not show. She was probably born in September, 1849. If so her death occurred in April, 1859, at which time her disability was removed. If she had survived, it would have been removed in September, 1867, more than twelve years before this action was commenced, to-wit: November 20, 1879. Complainant's coverture was removed in July, 1865, more than fourteen years before this action was commenced. Gregg's patent issued November 20, 1855, at which time the cause of action first accrued. The twenty-one years expired November 20, 1876, three years before the

action was brought. Or, if the accruing of the right, dates from possession taken, Swissgood's deposition shows this to have occurred in 1856, which is confirmed by the transcripts from the Justice's docket. In either view the bar was complete before suit commenced.

Conclusive as the foregoing reasoning is in regard to the Gregg survey No. 16070, it is no less so in regard to the Wallace survey No. 14530. In Clark vs. Potter, 32 O. S. R., 49, the Syllabus reads thus:—"One who enters upon land under color of title, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim."

In 1842 the Government granted to Cadwalader Wallace by letters patent, the controverted survey No. 14530 for fifty acres; also, by another patent, survey No. 13593. These were then unimproved, wild lands. In 1844, Wallace conveyed and surrendered possession of these two surveys to Peter J. Sutton as one entire tract, by a single instrument of conveyance, under color of which he entered and took possession thereof as an entire tract, and commenced improving the same. "I conveyed and surrendered the possession of 236 acres, being the whole of survey No. 14530, and part of survey No. 13593, to Johnson Watson as one entire tract, by a single instrument of conveyance, under which he then entered and took possession of said entire tract as one farm, and commenced improving the same." See Sutton's Deposition. In 1846 Johnson Watson conveyed and rendered the possession of 60 acres, being the North part of said Survey No. 14530, and the N. E. corner of said survey 13593, to E. S. Hughes, as one entire tract, by a single instrument of conveyance, under color of which he then entered and took possession thereof, and erected a cabin, and planted an orchard on said part of Survey No. 14530, in the actual possession of which he, and his heirs since his death, have continued asserting adverse title and paying taxes thereon.

Johnson Watson, under color of the said deed to him, continued from its date in the open, notorious, exclusive and adverse pos-

session of the remaining or South part of said Survey 14530, and part of Survey 13593, claiming title, and erecting permanent and valuable improvements, until, in 1853, he conveyed and surrendered possession of the same as an entire tract, by one deed, to William R. Watson, who, under color thereof, then entered and took possession of said entire tract, asserting adverse title thereto, paying taxes thereon, and actually occupying the same as a homestead farm until, in 1864, he conveyed the same, with forty-seven acres of other lands, to Esther Dennison as one entire tract, by a single deed, under color of which she then entered, and has since been and continued in the open, notorious, exclusive and adverse possession, claiming title to and paying taxes on the whole thereof, including said part of said Survey No. 14530, a small portion of which remained uninclosed, as the woodland of the farm, until 1865. See Depositions of W. P. Hughes; A. Murdock; William Swissgood; A. Dennison: and *the deeds* and *exhibits* attached thereto.

Thus exist, and for more than thirty-five years have continuously existed, all, singular, and exactly, the facts and conditions on the part of the Respondents, necessary to bring this case, and survey No. 14530, within the rules of Clark vs. Potter. So that, if this were an action of ejectment, adverse possession shown to have continued for more than twenty-one years would constitute a complete bar.

Disabilities will not be cumulated, or supplemented by other or subsequent disabilities. Whitney vs. Webb et al., 10 O. R., 513; Carey vs. Robinson, 13 O. R., 181. As to the Wallace Patent, Complainant's alleged rights accrued to her under the limitations act of 1831. When it issued, in 1842, she was of the age of thirteen and a half, and her sister, nine. When possession was taken, in 1844, they were respectively fifteen and one-half and eleven. If her action is proper now, it was proper then. If it be necessary now, it was necessary then. If a right, to preserve which the prosecution of a suit in equity, or civil action in chancery, is both proper and necessary, can be affected or barred by lapse of time, by analogy to

the Statute, the bar of Complainant as to said Wallace survey is complete and effectual.

As to the Gregg Patent, her alleged rights accrued under the limitations act of 1853, which is alike applicable to civil actions in chancery as to civil actions at law. It issued November 20, 1855, and possession was taken under it in 1856. Both title and possession have ever since been adversely claimed and held. If her action be proper now, it was proper then. If it be necessary now, it was necessary then. The running of the Statute, therefore, began when that necessity first descended or accrued. Hence, whether her action had been one at law to recover possession adversely held, or is rightly brought in equity to recover the legal title adversely held, it is within the peremptory provisions of that statute, and the bar of her right and remedy is complete.

IX.

As before stated, what Complainant's actions really are, or what relief she asks, is somewhat obscure. They can not be sustained as bills *quia timet;* for possession, actual or constructive, is essential to support such proceeding. Thomas vs. White, 2 O. S. R., 540. They are not bills to extinguish a continuing or subsisting trust, and decree the release and surrender of title; for such relief is not only not demanded, but vehemently repudiated. No relief whatever is prayed against the Respondents, except the surrender of possession and an accounting for rents and profits, which are only recoverable by an action at law, or as a resulting incident of jurisdiction acquired to grant other equitable relief against them; which, however, in these cases, is not demanded. Virtually and in effect, and as the sole ground of equity jurisdiction disclosed, the chancery powers of this Court are invoked to decree that the Government stand seized in perpetual trust, to Complainant's use, of a legal title, which it is prohibited by statute from granting to her by patent, resting her demand on an extinguished equity and dead survey.

X.

In its proper place I omitted to notice the averment in regard

to the withdrawal of Complainant's warrant. As she must show a *subsisting* right, interest, or equity, it will be noticed here. On the margin of Entry and Survey No. 12017, in the books of the principal Surveyor, the word "*withdrawn*" is written. In Galt vs. Galloway, 4th Peters, 331, it is said:—"An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others, at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by the records, must be received as *prima facie* evidence of the right of the person at whose instance they were recorded; and as *conclusive*, in regard to such things as the law requires to be recorded." The right to "*withdraw*" and "*relocate*" was subsequently prohibited, except on eviction; but the right to *withdraw* was not prohibited. The only evidence in the present case is the Deposition of E. P. Kendrick. When or by whom the word "withdrawn" was written upon the record in this case, he does not disclose. The *prima facie* effect of the entry is, therefore, not rebutted.

CONCLUSION.

If the interpretation and effect herein ascribed to the Statute of March 23, 1804, and the several acts supplemental thereto, be adopted by this court, permanent repose will be secured to thousands of homes within this district. Without the 3d Section, the result is the same. A statute commanding that a right shall be asserted, or an act done, within a time prescribed, peremptorily implies that it shall not be asserted or done at a subsequent time. The second Section of said act is peremptory, and the subsequent Statutes did not repeal, but only postponed the taking effect of its command. So that on and since January 1, 1852, under it alone, no warrant could be located; no entry surveyed; no return of any survey or warrant could be made; and no patent could issue on any unreturned survey made prior to that date, except in the special case mentioned in the act of March 3, 1855, within the purview of which the present cases do not fall. But when to the peremptory implication of the second section, is superadded the positive prohibition of the third section, the conclusion and its result are ovewhelming and irresistible.

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